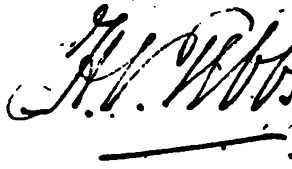

LONDON:
PRINTED BY J. S. HUGHES, 66, PATERNOSTER ROW.

ESSAY

ON THE

"SCRIPTURE DOCTRINES

OF

ADULTERY AND DIVORCE,

AND ON THE

CRIMINAL CHARACTER

AND

PUNISHMENT OF ADULTERY,

BY THE

ANCIENT LAWS OF ENGLAND AND OTHER COUNTRIES;"

BEING A SUBJECT PROPOSED FOR INVESTIGATION BY THE SOCIETY FOR PROMOTING CHRISTIAN KNOWLEDGE IN THE DIOCESE OF ST. DAVID'S;

AND TO WHICH THAT SOCIETY AWARDED ITS PREMIUM OF FIFTY POUNDS IN DECEMBER, 1821.

BY

H. V. TEBBS,

PROCTOR IN DOCTORS' COMMONS.

"Quid tristæ querimoniæ
Si non supplicio culpa reciditur?
Quid leges sine moribus
Vanæ proficiunt?"

HOR. CARM. lib. iii. 24. v. 33.

LONDON:

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1822.

LONDON:
PRINTED BY J. S. HUGHES, 66, PATERNOSTER ROW.

TO

THE MOST REVEREND FATHER IN GOD,

CHARLES,

BY DIVINE PROVIDENCE,

LORD ARCHBISHOP OF CANTERBURY,

PRIMATE OF ALL ENGLAND, AND METROPOLITAN,

&c. &c. &c.

THE FOLLOWING ESSAY,

ON A SUBJECT OF CONSIDERABLE IMPORTANCE,

AND ON THE VIEWS ENTERTAINED RESPECTING IT,

IN THOSE SACRED RECORDS,

WHICH ARE EQUALLY THE FOUNDATION OF THE RITES OF THE CHURCH,

AND THE BASIS OF ECCLESIASTICAL LAW,

IS, WITH THE GREATEST RESPECT,

DEDICATED,

BY A PRACTITIONER IN HIS GRACE'S

ECCLESIASTICAL COURTS,

AND BY HIS GRACE'S

MOST OBEDIENT

AND VERY HUMBLE SERVANT,

THE AUTHOR.

DOCTORS' COMMONS,
APRIL 10, 1822.

PREFACE.

THE Author of the following Essay would have been content, as the reward of his labour, with the premium awarded to him in the Diocese of St. David's, without obtruding himself upon the notice of the public, had not the solicitations of his more immediate friends, (a fact not the less true, because so frequently the author's plea, but which he might have been tempted to overlook as arising from their partiality,) been united with an intimation from the individual from whom the premium originated, that the publication of the Essay would be acceptably regarded; and this compelled him to surrender, though with considerable reluctance, his own wishes to the opinion of others.

Being thus brought before another tribunal, at which he naturally feels that sort of apprehension which accompanies a first appearance, he deems it but justice to himself to premise some of the circumstances under which the Essay was written, if not to excuse its errors, yet at least to induce a milder tone in the observations of those who may detect and expose them.

The subject, then, as thrown out for general investigation, was not seen by the Author till a considerable part of the period had elapsed within which the rival Essays were to be completed. That period was the latter end of July, 1821; and it was not till the beginning of June preceding, that the Author commenced his preliminary investigations, and those under no slight disadvantages. That period, the close of Easter and the commencement of Trinity Terms, more than ordinarily demanded his attention in his professional pursuits. His chief time for labour, therefore, was during the night; and the fatigues of a long day, when encountered by a constitution of not the stoutest texture, not unfrequently compelled him to relinquish his undertaking; one motive, however, stimulated him to revive it; and that

was the conviction, that, if he should not be fortunate enough to merit either the premium which has been since awarded to him, or that of twenty-five pounds, to be adjudged to the second successful Essay, yet the course of investigation in which he was engaged, closely connected as it was with his professional pursuits, would itself amply repay him for all his toil.

It is true, that, since the award of the premium, an opportunity has been afforded of revising the Essay in its progress through the press, but the Author has not deemed himself at liberty to make any material alterations in it, lest he might disturb those features of it (whichever they may have been) that received the stamp of approbation.

That the subject of the Essay is interesting and important, need hardly be remarked: it is an examination of the doctrines maintained in relation to the nature of the matrimonial crime, and the matrimonial bond as affected by it, by that authority from which the institution of marriage itself emanated, and by which, therefore, all other and inferior legislation should be guided. If, on this part of the subject, he would not pretend to the merit

of originality, he yet would hope to appear so to have availed himself of the best lights reflected upon it, as not to involve himself in the charge of a criminal carelessness. And, with regard to the other parts of his subject, which trace historically the ancient punishment of the matrimonial crime, it must be remembered, that, although they comprise many disgusting details, and although, in some respects, little comparative utility may result from them, yet he could not escape from the investigation.

If in commenting, however cautiously, on the penal laws of his own country, in relation to this subject, he may have rendered himself liable to censure, and the imputation of presumption, he does not err alone, and therefore gladly avails himself of the protecting shelter which is cast around him by the example of some great men, and the sanction derived to himself by the award in the Diocese of St. David's.

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OF all the wounds to which the sensibility and affections of man are exposed in his character and connexions as a social being, perhaps that which is inflicted by *Adultery* is the most poignant; and of all the remedial and penal consequences which the civil and ecclesiastical polities of nations have devised for those injuries which the passions of men inflict upon each other, none perhaps have been so diversified in their nature, or so frequently altered by circumstances, as those which have followed this crime. The *penal* results have passed through all the intermediate gradations between the forfeiture of life, and of a pecuniary mulct, while the chief and most appropriate of the *remedial* consequences, has been that of *Divorce*; but even this has been found varying with the changes of time; and existing or withdrawn, as all the varieties of corporal infliction have been, according to the shades of criminality which those who

legislated on the subject have attached to this offence.

These sentiments will find a more full expression in the subsequent parts of this Essay: the terms of the Thesis have drawn certain limits around the subject, which shall not be overstepped, but which may be incidentally pointed out in the course of the following remarks, to justify the absence of any more extended observations on certain parts of the subject of considerable importance, but from which the Thesis requires to be detached.

The principal object of the Essay will be the *investigation of those doctrines, which the Scriptures, both of the Old and New Testaments, maintain, in relation to the crime of Adultery, and the law of Divorce,* and in connexion with these, the views which appear to have been taken of each, by the ancient laws of England, and of the other principal nations of the world. It is not distinctly apprehended, whether the terms, " other countries," in the Thesis, were meant to include those great empires which survive now only in the records and recollections of departed glory, or whether they were intended to confine the observation to countries coeval only with ancient England ; nor whether the exclusive mention of the term *laws*, would prohibit all reference to the

customs and *usages* of each people, for whom those laws may have been enacted; but it is considered, that the customs and usages of a people so often originate, or modify, or explain their laws, and are always so closely connected with them, that an analysis of the latter would be next to impracticable, without a distinct reference to the former; and with respect to the treatment of these great subjects by the ancient nations of the world, but particularly the two most conspicuous in the annals of literature and science, it was considered that allusion to them was essential to *the history* of the case; and it has been desired, that nothing should be omitted which may render the investigation as full and complete as the subject itself is interesting and important. For this purpose, the outline of these observations should perhaps be of an *historical* character; and in order to reduce them as much as possible to clearness and method, it may be better to treat progressively of the laws and customs of the different countries and nations, *as they have severally existed in order of time:* this arrangement may, perhaps, a little invert the line marked out in the Thesis, but it will not essentially disturb it, and may probably contribute to the increased clearness of the discussion. Still the

most important part of the Essay will be held to be the accurate investigation of the doctrines of the *Scriptures* on these subjects; and this, as well because the authority of laws promulgated from such a source, possess an influence, and assert a claim, paramount to all others; as also, because the Thesis seems to mark out this as the chief object of the Essay, an object, as interesting in itself, as has been noble and generous the feeling which has called into exercise this and other competing efforts for its elucidation.

These prefatory remarks are necessary to clear the space on which the Essay itself is to rest, and to state distinctly the received import of the Thesis: and this view of the subject naturally leads to the following arrangement.

It is proposed, then,

First.—To investigate the regulations of the *Mosaic Law*, in relation to these subjects of Adultery and Divorce, and the customs of the ancient Hebrews founded upon it.

Secondly.—To state the various enactments and practices of the *Greeks* and *Romans* in the codes of their legislators, and the customs of their people.

Thirdly.—To inquire into the laws which the Saviour of the world and the Founder of the *Christian Faith* propounded on these subjects, with the opinions of the Apostles, the Fathers of the Christian Church, the usages of primitive Christians, and the edicts of Christian Emperors.

Fourthly.—To mention some of the laws and practices of various countries subsequently to that time; of England, Scotland, Ireland, France, Spain, Germany, Italy, and the East: confined, however, with one or two exceptions, to their *ancient* history; and, then,

Fifthly.—To conclude by some observations on the whole view of the case, and certain questions arising out of it, which may tend to place the miscellaneous facts and circumstances previously stated, in a more compendious form, and elicit from them something which may coincide with the intention of the individual who has proposed the discussion.

It will be necessary, under these several divisions, to treat distinctly from each other the two subjects of Adultery and Divorce; and of the former always first, as the consideration of

the crime should precede that of the remedial enactment. The necessity of any inquiry into the *origin and nature of the institution of marriage*, or the dictates of the *law of nature* on the subjects under consideration, is precluded by the terms of the Thesis, and in passing at once to the subjects proposed, it may be premised, that throughout the Essay, as much effort as possible shall be made against any violation of refinement; but necessity will compel the introduction of many disgusting particulars which fidelity to the subject cannot omit.

The first thing which is necessary to a right apprehension of all reasoning, is a correct definition of the terms employed. A general definition of the two principal terms on which we have now to comment, may be given in the outset, but the more peculiar acceptation of them belongs to the several heads of the Essay.

Adultery, then, is that act by which the marriage bed of another is violated. It is an injury, "*Ad alterius thorum*," from which, or as some have rendered it, "*Ul*terius," or short, "*Adulter*," it has derived its name of *Adulterium* or Adultery.

It is a crime which has this peculiar odium attached to it, that it has furnished a name to designate all foreign intermixtures, and when a departure from all purity and simplicity is

to be described by connexion with what is deteriorating and spurious, it is called *adulteration*. The crime of Adultery is repugnant to the very nature of matrimony, which of two makes one ; whereas, the other of one makes two. Properly speaking, Adultery is a crime which can only be committed with a *married person*. Both by the Jewish and the Roman laws, this was necessary to its existence. By our law, it is Adultery if *either* party be married.

The meaning of the word *Divorce*, is *separation;* its derivation is sufficiently plain from *divertere*, to turn away. The two kinds of Divorce, the one which severs from cohabitation merely ; the other, which dissolves the very *vinculum* or bond of marriage, shall be noticed more at large hereafter.

And now viewed thus, in connexion with each other, both cause and consequence compel a remark on the distressing appearances they present. Adultery does not appear a simple crime; it is lamentably complex, and generally in one form or other, besides the necessary attendants, lasciviousness and impurity; its other associates are *seduction* and *cruelty to children;* and, when viewed as committed against the obligation of a religious oath, it involves *perjury* also. Even the

remedy is an *injury*. A divorce cannot be effected without *violating the ends of marriage*, however much the cause may justify the measure; and the results of this crime are thus perceived to be, a total destruction of that union of hearts and interests which the conjugal state implies, a breach of the marriage compact, a blot upon domestic peace, an effectual impediment to the education of offspring, an alienation of affection, and a fruitful spring of bitter hatreds, raging jealousies, and deadly feuds.

But it is proper to hasten from these preliminary observations, to consider,

The regulations of the Mosaic Law, and the customs of the ancient Hebrews.

Before the giving of the Jewish Law, there was no instance of Adultery, (at least, on record,) and, therefore, no mention of Divorce. The patriarchal ages were distinguished by a simplicity and purity, which rendered unnecessary those strict regulations for which the progress of corruption afterwards imperatively called. Eusebius remarks, that their own piety was their unwritten law; so that, with respect to the subject of the present Essay, they were safely trusted with that liberty of marriage

and divorce, which it was certain they would not abuse.* The polygamy of some of the patriarchs is generally accounted for on the principles of *necessity*. The writers of the early church, and several modern writers of note, have justified and explained it in this manner: "Donec mundus repleretur," is an expression of Tertullian, and of Eusebius also. Another cause for it has been found in the desire so generally felt by them to become the parent of the promised seed. But there are instances among them of a voluntary restraint, even in this liberty. Noah, Isaac, and others, afford specimens of forbearance from repeated marriage, which strongly aid the suppositions just made. But the intercourse with Egypt succeeded to the time of these good men, and this led to the indulgence of that licentious liberty, which called for the restraints which the Mosaic code was afterwards to furnish.†

In considering that code, the first thing which requires to be observed, is, the distinc-

* Φυσικοις γαρ τοι λογισμοις και νομοις αγραφοις, την οφθην της αριτης διευθυναντες πορειαν, και πειραν των σαρκος ηδονων, επι τον σωφρονι και θεοσεβη βιον διαβιβασοτις αναγεφονται.

Præp. Evang. lib. vii. cap. 8. p. 309.

† The eighth chapter of Eusebius contains some interesting remarks on this subject, and is well worthy the attention of the scholar.

tion which exists between the *moral* and the *judicial* law. By the latter, many things were, from the necessity of the case, and the peculiar circumstances of the people, *connived at*, which were not at all countenanced by the former. This would have maintained a strictness, which the other was, in a degree, compelled to relax. Perhaps it is to this source that we may trace the various mistakes which have occurred in the writings of many on this subject, who have otherwise reasoned well, but have failed to remark this distinction. The *judicial law* of Moses was not to be regarded as the interpreter of the *moral:* the *doctrines of Christianity* afford the interpretation. These we shall afterwards consider, but we may now observe, that those imputations which would fasten on the Mosaic law the stigma of a moral laxity, not to say profaneness, when placed beside the stricter ethics of the New Testament, are most unjust. Doubtless, the difference of the outward provisions of the two systems was great, but certainly not such as to justify an aspersion of this kind, which seems to have originated in a loose view and confused apprehension of the varied nature of the two dispensations, and a forgetfulness of those customs imbibed from the soil of Egypt, which preceded the judaical economy, and on

which it was a restraint of great moral importance.

We come now to the enactments of that law itself. The first sentence, in relation to the subject of Adultery, is found in the second table of the Decalogue.* This verse contains an express prohibition of the crime, in terms as explicit as the circumstances under which it was uttered were impressive and awful. It is a simple prohibition: no reason is added, for the reason was unnecessary: it is one of those crimes which carries its own condemnation in its name, and immediately and sufficiently justifies its own prohibition. It has been already observed, that it annihilates the very end of marriage, and entails after it the greatest miseries and acutest sufferings.

This prohibition of the Decalogue has, however, received a wider interpretation than that which would restrict it to this crime. Many of the etymologists and commentators contend, that it restrains, not only the gross act of *adultery*, but all illicit coition, and all unnatural lusts. This has been the received opinion of many eminent Jews and Christians, though others limit it to the breach of *conjugal faith*. Philo and Tertullian state,

* Exodus xx. 14.

that some Greek copies of the Decalogue, extant in their time, placed this precept before that relative to *murder*, and they contend adultery to be the greater evil of the two. To this, however, it may be replied, that Moses no where gives so weighty a reason against this crime, as he did against the other, when he said, " In the *image of God made he man.*"

With regard to *other unnatural crimes, they* are made the subject of express prohibition in other parts of the divine law, and made capital; except, indeed, fornication; the punishment of this, if committed against a virgin, was a fine of fifty shekels and an obligation to marry her without the power of divorce. We shall consider the Seventh Commandment, then, as referring to *Adultery, in the usual acceptation of the term*, defined in Leviticus xviii. 20, as " *lying carnally with a neighbour's wife.*"* The terms of the prohibition are לא תנאף.

The Arabic root, from which the Hebrew word, נאף, is a derivative, signifies, " to satiate the thirst by drinking;" *situm explevit potu:* and the sacred writers appear to have made the exact application of this term in the comparisons which they institute in relation

* Levit. xviii. 20.

to this subject. Solomon denominates adulterous loves, " stolen *waters*," but describes the lawful enjoyment of a man's own wife, as the " drinking of waters out of his own cistern, and running waters out of his own well."*

The definition and prohibition of the crime are thus quite clear. The penalty attaching on the commission of it next follows. That is mentioned among the capital punishments, in Leviticus, xx. 10: " The man that committeth Adultery with another man's wife, even he that committeth Adultery with his neighbour's wife, the Adulterer and the Adulteress shall be surely put to death."†

This is repeated in Deuteronomy, xxii. 22: " If a man be found lying with a woman married to an husband, then they shall both of them die, both the man that lay with the woman, and the woman."‡ Several cases follow this last passage, mitigating the punishment where the guilt was not of equal enormity; but it is worthy of notice, that the violation of a woman during the period of her *sponsalia*, mentioned in the twenty-third verse,

* Prov. v. 15, 18. ix. 17. and verse 18, *Septuagint.* Cant. iv. 12, 15.

† Levit. xx. 10. ‡ Deut. xxii. 22.

was considered an *adulterous* act, and was visited by death. This marks the strictness which the Jewish law would maintain on the subject of the marriage vow. The only difference between the penalty attaching to the commission of this crime, during the contract for marriage before its solemnization, and defilement afterwards, was in the *mode of executing the offender*. But, of this presently. From what has been stated, it is clear that the punishment for Adultery was thus declared to be capital, and that both parties to it were placed on the same footing. Neither the violence of the passions of the one sex, nor the weakness and timidity of the other, were admitted as any excuse. The sixth chapter of Proverbs, and the 32nd and 35th verses, implies a continuance of this penalty in the days of Solomon;* and a passage, quoted below, the same in Ezekiel's time.†

The strictness of the Mosaic law, in reference to the Sponsalia mentioned above, is remarked by Maimonides. With the Jews, he states, that a woman might be espoused three ways; by money; i. e. probably, by dowry; by a writing, the settlement; or by a concubitus. Being thus espoused, though not yet married, nor conducted

* Prov. vi. 32—35. † Ezek. xvi. 38, 40.

into the man's house, yet was she his wife; and if any man should lie with her besides him, he would be punished *with death* by the Sanhedrim. And if the man himself would put her away, he must write a Bill of Divorce.

The modes of inflicting this penalty were various. A curious distinction has been drawn between the expressions of Scripture, wherein a variation in the pain and disgrace of this punishment has been supposed to be referred to; and this distinction has accordingly been prevailingly adopted by the Jews. When the punishment is simply mentioned as *death*, they understood it to imply *strangling;* but when it is said, " their blood shall be upon them," they supposed the mode intended to be *stoning*. So Selden states it: " Interficiuntur *morte;* simplici mortis mentione, *strangulationem* intelligunt, sed quemadmodum adjicitur illud, *sic sanguis super eos, lapidationem* denotat."* And the reason of this was because strangling was the easiest death of the four in use among the Jews; and, where the mode was not specially prescribed, they said, " Ampliandi favores," the most merciful exposition is to be given. But the rule is not correct. For the expression of the punishment of Adultery

* Selden de Uxor. Hebraica.

is of the former kind, " *Morte plectetur*," let him be *put to death*, which would imply *strangling*. But this was not so understood ; for Adultery was punished by *stoning*. In Ezekiel xvi. 38, God is represented declaring, " I will judge thee after the *manner of women that break wedlock;* and in the fortieth verse, the judgment is mentioned, " I will *stone* thee with *stones;*" to which we may add, that when the Pharisees came to Christ, as related in a passage of the New Testament, on which some further remarks will be made in the third section of the Essay, they said of the Adulterers, " Now Moses, in the law, commanded us, that such should be *stoned.*" It is not necessary to explain the meaning of these punishments, their names sufficiently indicate the mode of their infliction.

These are the parts of the Mosaic code which apply to the case of Adultery, when *discovered and proved.* But that law contemplated the occurrences of cases where a moral conviction might exist of the guilt of the offender, but without such evidence as would conduct to *legal* conviction; and here a curious peculiarity in that law rises to view, the institution of a test by which the guilt of the suspected party might be detected, or her innocence made clear; viz. the *waters of*

jealousy. This test was a remarkable feature in the law of Moses; it intimated the strict sense entertained by that law of the importance of purity and fidelity to the preservation of domestic and civil peace, and strongly indicated *also the divine origin of that code;* for it was, in fact, a promise of *a perpetual miracle*, by which the innocent should be cleared of all suspicion, and the guilty infallibly exposed and awfully punished. And what lawgiver, if he possessed any relic of common sense, would have instituted such a test, the efficacy of which, the irregularities and passions of a day might have brought to trial, and the failure of which would have involved himself in perplexity, and covered his legislation with shame, had he not been fully and satisfactorily persuaded of the truth of his commission from Heaven?

The particulars of this test, as related in the Scriptures, will be found in the fifth chapter of the Book of Numbers, the eleventh verse to the thirty-first.* To these, the Talmudists have added several circumstances attending the execution of this ordeal, but perhaps not of much authority. The accounts given by Maimonides and Selden are very full. The sum of

* Numb. v. 11—31.

the whole is this. The jealous husband brought the suspected wife to the priest, with the cake of jealousy, communicated his suspicions, and offered his witnesses; the wife asserted her innocence and required the test. "Hanc uxorem meam zelotypus præmonui de N: quocum postea occultata est, rem in secreta egit, atque hi sunt testes. Illa se innocenter esse ait. De te peto, ut potes, mihi detur quo rei examen fuit."

The witnesses were then excluded; the priest entered into a long discourse with the woman, and exhorted her to confess, if indeed it might have been the case, informing her at the same time of the results she might expect. "Si non concubuit vir tecum, et non declinasti ad immunditiam sub viro tuo, liberabis ut innocens ab aquis sitis amaris et maledictis; sin tu declinasti sub marito tuo et polluta es, det te Dominus in execrationem et diras in ludo populi tui, adeo ut loquet Dominus *corruere femur tuum et inflare uterum tuum*," &c. &c.*

If the woman persisted in asserting her innocence, he prepared the *bitter waters* and *read the curse;* to which, "illa respondebat Amen, Amen." This two-fold solemn consent

* Numb. v. 22.

to the awful appeal which this test was about to make to God, implying, on the part of her who made it a desire to be dealt with according to her innocence or guilt, and an acknowledgment of the justice of God in visiting the guilty with the punishment, could not have been made with any consciousness of the crime, unless in conjunction with the utmost hardness of heart, presumptuous defiance of God, and even atheistical unbelief. Every thing in the apparatus of this ordeal was calculated to produce a confession, rather than risk such tremendous consequences. Confession, too, according to the Jewish writers, was not followed by death, but only by divorce without a dowry. The curse being then blotted out with bitter water, (and the ink being made without vitriol in those days, was easily washed away,) the waters were then given, and the cake of jealousy offered to the Lord; and, as the woman took the cup, the priest said; "Filia mea! si adeo certum sit, te innocentem esse, ex fiduciâ innocentiæ bibe, nec omnia times; *quoniam aquæ aliter non se habent ac venenum siccatum super carnem animalis. Si vulnus ibi fuerit, dolorem affert et irrodit, sin vero vulnus ibi non sit, nullum omnino affert dolorem.*" The results then testified the innocence or guilt of the woman.

Several circumstances are mentioned as occurring in this ordeal; that, if the husband of the suspected party had been guilty of a similar crime, the waters lost all their virtue: that, if she *was* guilty, and the symptoms of guilt appeared in the pale and ghastly countenance, the starting eyes, and the swelling and rottenness; *her partner in the crime*, whoever and wherever he were, was struck with death also: but that if she were innocent of the charge, the very waters of jealousy proved no poison, but contributed as a salutary medicine to cleanse her constitution, and render her more vigorous and fruitful.

These are the particulars of this remarkable feature of the Mosaic law, respecting suspected adultery; and in an essay on that subject, they could not be curtailed. Although the Infidel, who, doubting the *divine origin* of a revelation, would also question the divine *superintendence over the fulfilment* of its denunciations, may only sneer at the credulity of those who admit the truth of the accounts just given, yet the Christian will not be disposed to deny the credibility of what, though remarkable, is not impossible: and he will indeed see nothing more unacccountable in this than in many other circumstances, well attested, which support the authority of divine revelation.

No instance has, however, been particularized of any authority wherein this expedient was had recourse to. It certainly must have operated as a powerful restraint upon the Jewish females, so to live as to be exempt from the slightest taint of suspicion: and it must have also restrained the cruel treatment of husbands, as the process must have been tried at the sanctuary, and occasioned considerable expense; and therefore would not be resorted to on slight occasions; and in this view it would undoubtedly prevent divorces for *suspicion*, or *trivial offences;* so that, in every sense, as a preventive regulation, it was productive of good.

In later ages, the crime of Adultery became so frequent and public, that the test was necessarily disused. Indeed, it was only of a nature to be applied in doubtful circumstances. Selden closes his remarks by this allusion; " Ex quo multiplicati adulteri, defuerunt aquæ amaræ."

With regard also to the general punishment attaching to this offence, the same circumstance, the increase of crime, and the growing laxity of morals, occasioned the reduction of the severity of the first enactment to the most feeble and puerile consequences; and we find the Rabbinical glosses dictating the exchange

of a capital punishment for the exposure of the adulterer naked, in the summer season, to the flies and wasps, and in the winter, steeping him up to the chin in cold water, to quench the flames of lust.

But the Hebrew laws and customs, in relation to DIVORCE, come now to be considered. And herein must be remarked the causes for which it was permitted, and the persons to whom it was indulged; observing, in the outset, that it was a measure rather *connived at* than *enjoined* (as the Jews thought it had been) by the divine law.

Divorce, strictly considered, is a deviation from the original institution of marriage, consequent on man's depravity, the inconstancy of his mind, and the impetuosity of his passions. We have already said, that we do not find it practised by any of the Patriarchs. The Jews, indeed, pretend that Abraham divorced Hagar, and Moses Zipporah, and thence conclude, that divorce was of an earlier date, and lawful on other accounts than those prescribed in the law of Moses; but these instances prove quite otherwise on examination. Hagar was not a *wife*, but a *bond-woman*; and her's was not a *divorce*, but an *expulsion* brought upon herself by her foolish conduct;

and as to the case of Zipporah, the words in the fourth chapter of Exodus are somewhat ambiguous; and, if she *did* go to her father's house for a short time, she returned very soon afterwards to Moses again. Calmet affirms that Moses never divorced his wife at all.*

Not one precedent of divorce can be found anterior to the Mosaic law. Afterwards, indeed, they became lamentably frequent, and furnished one among the many subjects against which the Prophets directed open reproofs. The Prophet Micah represents the Divine Being, saying, "The women of my people have ye cast out from their pleasant houses:"† and the Prophet Malachi; "The Lord is witness between thee and the wife of thy youth, against whom thou dealest treacherously, yet is she thy companion, and the wife of thy youth."‡

The Hebrew law itself thus limits and prescribes the liberty of Divorce; the whole passage is transcribed, as it will be the foundation of many subsequent remarks. It is from Deuteronomy: "When a man hath taken a wife, and married her, and it come to pass that she

* The writers of the Ancient Universal History, and Calmet's Antiquities.

† Micah ii. 9.

‡ Malachi ii. 14.

find no favour in his eyes, because he hath found some uncleanness in her; then let him write her a bill of divorcement, and give it into her hand, and send her out of his house; and when she is departed out of his house, she may go and be another man's wife. And if the latter husband hate her, and write her a bill of divorcement, and giveth it into her hand, and sendeth her out of *his* house, or, if the latter husband *die*, which took her to be his wife, her former husband which sent her away, may not take her again to be his wife after that she is defiled, for that is abomination before the Lord." *

This is the celebrated passage in the Mosaic law, which relates to the matter of Divorce. That there is a clear permission of Divorce, need scarcely be observed; but it is equally clear, that such permission is environed with certain limitations and restrictions. Foreign as Divorce was to the original institution of marriage, necessity compelled its permission; and God was pleased, in the judicial law, (the magistrate's rule,) not totally to prohibit it, lest it might occasion the cruel treatment, or even murder, of those women who were not agreeable to their husbands. So the Saviour has interpreted the permission. " Moses *suf-*

* Deut. xxiv. 1—4.

fered you, for the hardness of your hearts, to put away ; but from the beginning," the original institution, " it was not so." After the age of the Patriarchs, and during the period that intervened between them and the giving of the law, the impure connexion with Egypt had introduced a corruption of manners, and indulged a vicious and excessive polygamy, which greatly needed some restraint. Few solemnities of marriage were observed, and wives and children were dismissed from their homes at the arbitrary will and irresponsible pleasure of their lord. The husband possessed not only the power of repudiation, and that dependent on his *personal motives and feelings*, but also on his *sole and personal execution.* But by the law, personal caprice was placed under restraints, the licentiousness which had perverted the sound use of marriage was corrected, and the sanctity of its nature, and the durability of its obligations, were recognized. Those great crimes, which would *naturally* dissolve such a contract, Adultery, the violation of the nuptial vow, we have already shown were punished with death; and the causes which allowed of the exercise of Divorce, under the passage above quoted, are now to be considered.

The term employed to describe these

causes in the English Version of the Pentateuch, is "*some uncleanness.*" Expositors have been greatly divided in their opinions respecting the latitude of interpretation to be given to this term. Some contend that it signified *Adultery*, and others, such crimes as *idolatry*, &c.; but the answer to this is sufficiently obvious. Moses had previously prescribed a particular punishment for those, and made *Adultery* capital; he would, therefore, hardly ordain a Divorce against those who were to be put to death.* Others, again, have given to the term the interpretation of *barrenness*, involving no moral guilt, as in the other cases. This interpretation might be supported by the consideration, that if such were the cause, it might have been intended to

* There has indeed been one mode suggested in which these two enactments would appear compatible, and the law of death and the law of divorce be made to consist together. The one might be a punishment denounced to deter from the commission of the crime, by terror; the other, a permission granted, of a remedial nature, to the injured party, by which a way of mercy was open to the transgressor, and the punishment not regarded as compulsory. The law of death held the adulterous party in a snare; the law of divorce might be intended to mitigate the cruelty of the stronger to the weaker sex, who, if no way were left open but the former, might exact the penalty to its fullest extent.

repress the selection of such a partner as would only serve to gratify the base purposes of carnal indulgence, defeating the intent of marriage, the procreation of children; and it would obtain credit from the natural anxiety of many to become the parent of the promised seed. The probability is, that the word implied some *bodily inaptitude*, or some involuntary or *ceremonial uncleanness* or disease, whether natural or contracted, which rendered the woman unpleasant in the sight of the husband, and *unfit for the purpose of marriage*. The original terms are, ערות דבר, literally, "nakedness of a thing, or a *word*, or *matter*, of *nakedness* or *shame*,"—probably, any thing *unseemly or indecent*. The LXX. have accordingly translated it, *ασχημοσυνη πραγματος* in Deuteronomy xxiii. 14; and by *ασχημον πραγμα* in Deuteronomy xxiv. 1. Selden, in explaining the passage, renders it "rem fœdam;" "et Judæi Hispanienses, *discobertura cosa*."

In this latter, it evidently alludes to some personal infirmity, not discovered till after marriage, but such, perhaps, as a good man might bear with; and therefore, our Lord, in alluding to this text, says, Moses permitted them to put away their wives, because of the hardness of their hearts; that is, as before intimated, lest, from a want of charity, they

might ill treat them under such circumstances.

On the subject of this celebrated text, it is well known, that two great divisions of sentiment, on the critical meaning of the term ערות, and the moral of the precept it contains, have been found in the two schools of Hillel and Shammai. These two learned Rabbies, so frequently mentioned by Josephus, advanced very different notions on this text. The first contended, that the former part of the clause (which was to be read disjunctively) controlled the meaning of the latter, and thus opened the text to a construction, well suited, indeed, to the carnal minds of the people, to imply any, the *slightest causes of dislike*, as a sufficient ground of separation; dissatisfaction with her mode of preparing his meals, or the sight of any woman more pleasing to him than his wife. We can hardly conceive any thing more pregnant with mischief, than such a perversion of this term. But the more virtuous Shammai, who was for upholding the rigour and purity of the divine law, insists on its exclusive reference to *unchastity*, to which he confines this case of turpitude.

Ex sententia scholæ Sammaenæ uxor marito, haud erat repudianda, nisi si inveniebat in eâ *rem turpitudinis, secundum id quod scrip-*

tum est. At juxtam scholam Hillelianam etiam ob *cibum ejus nimio ardore coctum,* (causam quantulam cunque,) *secundum id etiam quod scriptum est.** It is amusing to see the same passages of Scripture quoted by learned men to justify opposite conclusions.

One of the passages in the Gemara, quoted by Lightfoot, favors the interpretation of Shammai; " Whosoever, said the law, had corrupted a maid, might not put her away all his days: so neither could a man dismiss his wife, unless he found some *foulness,* i. e. adultery in her."

Of course, the lax interpretation of Hillel found the greater number of abettors from the corrupt inclinations of men. We shall have occasion, hereafter, to notice the prevalence of these loose notions in the time of Christ, and the check they received from his authority; but we may just remark, how strikingly opposed the purity of his precepts was to the glosses of the Rabbies. R. Akibal (one of the number, a specimen of the rest) says, it was the permission of the Jewish legislator, that, if any one saw a woman, whom he was delighted withal, above his wife, he might dismiss his wife, and marry her; whereas,

* Selden Uxor Hebraica. ch. xix.

the interpretation given by Christ, of the prohibition of that legislator, is, "Whosoever looketh on a woman, to lust after her, hath committed adultery with her already in his heart."*

We pass now to consider more particularly the manner of using this privilege of Divorce, and the cases of some of those who are said to have indulged it. Though Divorce was *allowed*, it was placed under many regulations. Formerly, it was practised in secrecy, and at the pleasure of either party; but now, certain forms were to be attended to, and a degree of publicity was required.

The wife could not, in a fit of anger, be hastily dismissed, but a legal instrument was to be prepared, called the *Bill of Divorcement*. The *verbal* order, rash, peremptory, and perhaps quickly repented of, was now displaced by a *written declaration*, probably specifying the reasons of the act, and duly authenticated in the presence of grave and qualified witnesses. This instrument was doubtless prepared by a public notary; and we may suppose it more than probable, that it contained some provisions for the maintenance of the wife, out of the husband's substance, termed in the

* Matthew v. 28.

Ecclesiastical Courts, the allotment of alimony, from the husband's faculties.

Ten particulars were requisite, in order to render this bill valid: the chief of which were, that it should be a *written* document, prepared by a notary or proctor, in the presence of one or two learned Rabbies; that it should be the dictate of the man's own mind, and not extorted from him; that it should be delivered to the wife in person, and that it should put her beyond his power. There were other trifling niceties, such as its being written on ruled vellum, to contain, neither more nor less than twelve lines, in square letters; besides that, neither the notary, the Rabbies, nor the witnesses, were to be related to either of the parties, nor to each other.

Let us attend a little to the effect of this, and we shall discover a propriety in it, of great moment. The reasons of this arrangement were two-fold, and both afforded a considerable safeguard to the wife.

1. The restrictions it imposed on the passions of the men; and,

2. The evidence it supplied of the wife's actual state.

Before this period, a man, under the influence of passion, might hastily dismiss his wife; and when the act was past, recall, repent of it

without avail. But here was provision for an act to be deliberately executed, affording some time for reflection on its probable consequences.

This is the way that the celebrated Picart states it; "These many formalities took up a great deal of time, in order to prevent the people from making an ill use of this privilege of divorce, so that it often happened, that they changed their minds and were reconciled, before the instruments of divorce could be made out, and afterwards lived very happily together.*

Spencer, in his treatise on the Hebrew rites, has also regarded this provision as intended for a counterpoise against the too great facility of separation. "Cum libellus non nisi *subducta ratione* et *animo sedatiore* scribi potuerit, *multis inde divortiis obstaculo fuit.*"†

This was the first result of the new provision to guard against precipitation. But there was the other reason, and that the principal one for the written record of this act, that which arises out of the second clause of the Divorce law, in Deuteronomy xxiv.; "She may go and be another man's wife." It was the power of re-marriage which was contemplated in this

* Religious Customs, vol. iii. † Page 654.

provision. A woman, thus divorced, might be united to any person, except to her husband unless under circumstances to be mentioned presently.

We notice now the form of the Bill of Divorce, called Ghett. The treatise in the Talmud concerning it, is called Ghittim. It is stated, with some slight variations, by Maimonides, Buxtorf, Selden, and Grotius. It will be sufficient to quote the two latter. It began with setting forth the names of the parties, the date of the instrument, and the circumstances leading to the separation; and then concludes thus:

"Mea sponte, nullius coactu, te uxorem hactenus meam dimittere a me, deserere ac repudiare decrevi; jamque adeo te dimitto, desero, ac repudio, atque a me ejicio, ut tuæ sis potestatis, tuoque arbitratu ac lubitu quolibet discedas, neque id quisquam ullo tempore prohibessit." And then the concluding clause gives this liberty of re-marriage; "Atque ita dimissa esto, ut *cuivis viro nubere tibi liceat.*"

The words of Selden are, "Detur ei potestatem abeundi, et *nubat cuiqunque viro voluerit*, nec quisquam ei interdicatur ab hoc tempore in perpetuam."

Now here was the utility of this Bill. It served as an attestation of the condition of the

wife to all the world, and particularly to the "cuiqunque viro," who might wish to ascertain her liberty in this respect. It might also be used by the wife, as a bar against the husband's resumption of her. Both Josephus and St. Jerome speak of the Bill of Divorce, as being to this effect; "I promise thee, that hereafter, I will lay no claim to thee." But, as it has been already said, there was an opportunity afforded to restore the connexion. A legal interval was allowed (indeed it was necessary) between the separation and the wife's alliance with another, stated variously, at ninety days; by some, at less, and by others, at more; in order to determine whether the wife might not be in that state in which offspring might be anticipated, and thus its right parent be ascertained. Within this interval might be enjoyed the privilege of reconciliation; that is, if *both* parties were desirous of it, and the wife would wave her power of perpetual alienation from her husband: but if she was once married to another, the power of re-union then ceased.* This re-union was called *abomination* before the Lord; and Grotius assigns this as the reason: "Ne specie divortii alii aliis uxores darent usurarias;" this custom of *lend-*

* Deut. xxiv. 3, 4.

ing wives being one of the detestable evils of many cotemporary nations.

We come now to a few remarks on the *actual use and instances* of this privilege of Divorce. With regard to the employment of the Bill of Divorce, it is certain, that, like the test of Adultery, no specific record of it is to be found in the Sacred Volume, and no mention is made of it after the passage before noticed, till the time of Isaiah, near seven hundred years afterwards.* How far, in consequence of this absence of records of their use, the institution of these provisions may indicate the wisdom and practical good of their tendency, in restraining those acts which might have previously led to the licentious

* " Ante Isaiam Prophetam nomen ejus in historiâ sacrâ non occurrit D.CC. a lege annos elapsos." Selden Ux. Heb.

It is, indeed, thought, from the reports of the Rabbies, that soldiers, going on service, were obliged to give their wives Bills of Divorce, so that, if they did not return in three years, they might marry again: and that it was for these Bills, that Jesse sent his son David to his brethren, in the Camp of Saul; (take their *pledge*;) but how much more natural is the interpretation of that term, to signify the proof or pledge of their *health*, (see how they fare.) It was also thought, that Uriah had given his wife a Bill of this kind; but the ingenuities of the Rabbies are endless.

commission of Adultery, or the wanton use of Divorce, is a question that merits some attention.

It is, however, certain, that Divorces could not have been frequent among the ancient Jews, and this from two or three provisions of their law. Deuteronomy xxi. 15, 16. xxii. 13, 19.* By one of these, a man, accusing his wife of not being a maid, was obliged to bring the matter to a kind of judicial investigation, and if innocent, she could not be sent away all her days. The other preserved the first-born from being deprived of his inheritance, although he was the son of a wife not beloved. If Divorces, under the new regulation, had not been considerably restrained, these laws would have been of little use, as the Israelite would not, in *the possession of such a liberty, live with a wife he hated,* but would have immediately put her away.†

It has indeed been even supposed, from the cases of the Levite, mentioned in Judges

* Deut. xxi. 15, 16. xxii. 13, 19.

† According to the expression in the Book of the Ecclesiasticus; "If she go not as thou wouldst have her, cut her off from thy flesh, write her a Bill of Divorce, and let her go." xxv. 26.

xix.* and of Samson, in the same book, xv. † as well as that of David, in 2 Samuel, xx. 3. ;‡ that the nuptial breach was not considered a sufficient ground of Divorce. But this is absurd enough. These cases prove nothing of the kind. Indeed, we have already remarked on the punishment with which the nuptial breach was visited, and the inapplicability of a provision for Divorce in such cases, except as opening a path of lenience and mercy, by which the injured party might be content with the *remedial,* and not seek the infliction of the *penal* consequences.

David's was the case of *concubines*, never regarded with the same strictness as that of a *wife;* and from the monarch's treatment of *them*, viz. by condemning them to perpetual confinement, and a sort of widowhood, we may infer how much more severely he would have visited this offence in *a wife*. The conduct of Samson is a proof of strong feeling and revival of affection, rather than of the *state of the law* on these matters, and that of the Levite is nearly similar. She was his wife, and had been guilty of Adultery ; the circumstance of her fleeing from him, proves

* Judges xix. † Judges xv.
‡ 2 Samuel xx. 3.

her apprehension of some punishment, and probably, it was from a fear of her being made a public example, that his still existing regard prompted him to seek a reconciliation. The indignation, however, and thirst of revenge, which were felt, are sufficiently evident: the Israelites were instigated to take up arms and almost to destroy the whole tribe of Benjamin, because they refused to give up the adulterers.

The case of David and Michal is somewhat stronger: Michal was certainly given by Saul to Phaltiel, and it is said, this could not have been done, unless *a Bill of Divorce* had been given. But the arbitrary character of Saul is a much more obvious explanation of this; and we find, that after his death, David claimed her again.

It is tolerably certain, that we do not find any instances in the whole of the Old Testament, of Divorces, either on this or any other ground, except that mentioned as occurring after the captivity, when the Jews, at the instance of their leader, put away the strange or idolatrous wives whom they had married in Babylon.* This, however, was from considerations peculiar to the Jews alone, and was a remarkable instance of the resolute

* Ezra x. Nehemiah xiii. 23.

decision of this great reformer, in removing abuses and evils, with whatever painful sacrifices attended, and restoring all things to their pristine rigidness.

Afterwards, as we have remarked, a great corruption of manners was introduced, in which the utmost laxity prevailed; so much as even to allow, on the most trivial occasions, the liberty of Divorce to the wife.

It has been matter of dispute, whether the Jewish law allowed *the women this privilege at all.* But the only case, indicating an approach to the grant of this freedom *to her*, was that of the virgin, betrothed by her parents during her minority, who *might* refuse to ratify the contract, when she attained her age, on the sole ground of dislike. But this was no liberty of Divorce; as no *marriage had been solemnized.**

Josephus was of opinion, that Divorce was

* Selden gives the form of this Bill, which he terms libellus *renunciationis.* Lightfoot calls it, letters of forsaking, or, a Bill of Dismission. N. recusavit seu renunciavit coram nobis, M. ad hunc modum verba faciens. Mater mea aut frater meus errare me fecit et decepit me et desponsavit me. Nunc vero animi mei sententiam coram vobis aperio; illum *mihi non placere* neque ego *cum illo mansuram.* Et scripsimus hoc et subsignavimus et secundum jus ejus sic habetur.

far from being permitted to women; so that, if a husband even forsook his wife, she had not the power of re-marriage, till she had obtained from *him* a Bill of Divorce. The cases mentioned three pages back, do not evidence this privilege as belonging to the women. St. Ambrose imagined, that the Levite's wife had actually divorced him, " remisit claves." But the most common opinion is, that she only forsook him on occasion of domestic jars; and it is certain that she did not marry another; but when her husband claimed her again, her father did not deny his right.

Josephus records the first case of a wife who took upon her to repudiate her husband.* It was of a woman named Salome, the daughter of Herod, who gave a Bill of Divorcement to her husband Costobarus, Governor of Idumea; but, he says, it was only *permitted to the men* so to do; and this usurpation of his power, as he terms it, was afterwards imitated by many.

Among the eastern nations, the female sex has always had but little authority. The wife is regarded as little more than a necessary possession, and no regard is paid to them in the enacting of laws, or in public

* Antiquities, lib. xv. cap. 7.

transactions. We see that even the Hebrew law contained no permission of this liberty to that sex; the reasons were, doubtless, the wisest, and could not spring from *indifference* to them, as so many regulations were made which peculiarly respected their comfort and security. And the attainment and exercise of this power by the women, at a future period of the Jewish history, may probably be traced up to the intercourse of the Hebrew nation with the Greek and Roman, who *did allow of it to their women.* The innovation only required some decisive example. The case of Salome furnished it; and we soon hear of other instances, of Herodias, of Drusilla, the Jewess, mentioned in the Acts,* who left her husband Azizus, King of Emessa, and cohabited with Felix the Roman Procurator, and also of the two other sisters of Agrippa,† Berenice, and Mariamne, who each divorced their husbands.

It is also supposed, that the words of the Saviour, " If *a woman put away her husband,* and marry another," &c. imply the existence of this practice at that time; and some con-

* Antiquities, xx. 7.

† Agrippa, formerly King of Chalcis, afterwards of Trachonitis and Batanea.

jecture that the woman of Samaria was an instance of it, who had (*divorced*, they contend) five husbands, and that her marriage with the first, being still in force, the marriage was unlawful which she had contracted with the last: "He whom thou now hast is not thy husband;"* but no reliance can be placed on this.

With regard to the men, they exercised the power in the later ages of the Jewish nation with great freedom; the interpretation of Hillel they approved, and acted upon it.

Josephus says, "If a man *has a mind* to part from his wife, upon what cause soever, as *there are pretences in abundance*, let him give her under his hand a Bill of Divorce, and they shall never come together again." And, in the account of his life he tells us, that he acted upon this himself, for he divorced his wife, *not liking her temper at all*;† and this, though she was the mother of three children.

Philo the Jew has also a passage to the same effect, indicating a familiarity with divorces which was then prevalent for the slightest and most frivolous pretences.

* John iv. 18.

† Την γυναικα μη αρεσχομενος τοις ηθεσι απεπεμψαμην τριων παιδων μητερα.

Some have imagined that this unrestrained liberty in the dissolution of marriage is a main ingredient in civil comfort; but we shall have abundant occasion, in remarking on the results of it, particularly in the case of the Roman people, to observe its contrary tendency. And this part of the Essay, on the Hebrew Divorces, cannot be better closed than in the elegant and expressive sentiment of the Rabbi Eleazer:—" Tears shall bedew that altar which witnesses the hasty dissolution of the marriage vow." *

* כל המגרש אשתי ראשונה אפילו מובח מוריך עליו במעורין.
" Quisquis repudiaverit temere uxorem suam primam, etiam altare lachrymos ob eum effundit."

SECTION II.

THE second branch of this Essay respects the laws and customs which prevailed among the most celebrated of the ancient nations, on the subjects of Adultery and Divorce, which appear to have strangely varied at different periods of time.

Fidelity to the marriage bed has ever been considered, especially on the part of the woman, one of the most essential obligations of the matrimonial compact, and the wisdom of the best legislators will be discovered in following its violation by some punishment; but these punishments will generally appear to have reference to the manner in which the acquisition of the wife was obtained by the customs of different nations; and the relative value stamped upon the female sex by civilization and the refinement of manners.

Ancient Greece shall be considered first. In the heroic ages, while revenge was almost the only principle that actuated the Greeks, Adultery was frequently punished by murder; but it is not to be wondered at, that a crime like this, inflicting such a wound on domestic enjoyment, should often prompt a man to take the punishment of it into his own hands. When Thyestes, son of Pelops, King of Mycene and Argos, had seduced the wife of his brother Atreus, Atreus invited him to a feast, and entertained him with the flesh of his two children, Tantalus and Plisthenes; and their father, fearing some further violence, made his escape.

From certain passages in Homer,* it would appear, that the adulterer was sometimes *stoned, or pressed to death.* The wealthy delinquent was however allowed to redeem himself with money, which was called by the disgraceful, but expressive term, μοιχαργεια, and was paid to the husband of the adulteress. The woman's father, also, returned all the dowry which he might have received (according to the custom of those times) from her husband. These practices belonged to the earliest ages, in which another punishment

* Iliad γ. the punishment called λαϊνος χιτων, a stone coat.

was also adopted, that of *putting out the the adulterer's eyes*, either thus to extinguish the fire which had enflamed so destructively, or to stop the avenues by which temptation might again enter. This latter custom the Locrians observed in later ages, and a memorable instance of it is afforded in the case of Zaleucus their lawgiver,* who executed it with the utmost rigour, although the offender was his own son; but the feelings of the father conflicting with the sternness of the judge, he redeemed one of his son's eyes by putting out one of his own, and thus became as memorable for his mercy as he was for his justice.†

But the first who is said to have enacted a law, and instituted punishments against Adultery, was one Hyettus, an inhabitant of Argos. With a barbarity, characteristic of his age, he delivered the offenders up to the power of

* Valerius Maximus and Ælianus.

† Owing to the similarity of names, (a circumstance which is found, not seldom, to originate such mistakes,) this anecdote is stated, by some writers, of "*Seleucus* Nicanor, who succeded Alexander in the government of Syria, and (as they say) decreed this exoculation against the adulterer, and first impartially executed it on his own son."

the man who detected them, who might dismember, or murder, or treat them in any manner he might think best.

A discretion somewhat similar to this was afterwards authorized by the laws of Solon. According to the statement of Lysias, if any one were imprisoned on suspicion of Adultery, he might appeal to the Thesmothetæ, and, if he was acquitted of the crime, he was to be discharged; but, if guilty, he was to give sureties for *his future chastity*, and punished according to the *discretion of the judges*. This supposes that their authority to punish was restrained within the limits of the vitæ et necis potestas.

The Greek writers have mentioned a remarkable kind of infliction, employed as the punishment of this offence. It is chiefly to be collected from passages in Lucian, * Diogenes Laertius, † and Vossius. ‡ It was that of impaling the offender with a radish, or a fish called the mugilis, or mullet.

* Ραφανιδι την πυγην βεβυσμενος. Lucian.

† Προς τον μοιχον ειφη, αγνοεις οτι ου μονοι—εχει χρηστον, αλλα και ραφανιδες. Diog. Laert.

‡ Τιμωρος μοιχων ραφανος. Voss. in Notes on Catullus.

The Latin poets, Juvenal* and Catullus,† also allude to it: whether there were any thing similar in the Roman jurisprudence; or whether, if not sanctioned by the magistrate, or any express law, it was a custom prevalent among them, is altogether uncertain.

Probably this punishment, like that mentioned in Homer, was confined to the poorer class; it is not known if it was mortal, although one instance is recorded, that of Alcæus, who is said to have died of it. It was called παρατιλμος ραφανιδωσις.‡

By the laws of Crete, the punishment of Adultery was characterized as much by satire as by severity. They covered the guilty persons with wool, as an emblem of the effeminacy of their disposition, and in that dress, carried them through the city to the house of the magistrate, who condemned them to ignominy, which deprived them of all their privileges,

* "Quosdam mæchos et mugilis intrat." Juv. Sat. x.

† "Ah tum te miserum, malique fati
Quem attractis pedibus, patente portâ
Percurrent *raphanique, mugilesque.*"
Catull. Epig. xv.

‡ See Bayle's Dictionary, in Voc. Alceus.

and their share in the management of public business.

The Athenian punishments were very arbitrary, and inflicted often solely at the will of the supreme magistrate. An instance of extreme severity is mentioned in the annals of Attica, as imposed by the last Archon of Codrus's line, on his own son, whom he caused to be torn in pieces for this crime.*

This was, however, before the time of Solon; part of *his* legislation on this subject has been already noticed; but, in addition, it may be observed, that he enacted, that the husband who detected his wife in the act, might kill the adulterer; as if the lawgiver felt the probability, that the cool and dilatory sentence of the law would not keep pace with the vengeance which a husband might consider due to this crime. The adulteress was likewise ever afterwards prohibited the use of ornaments; and any one who found her wearing them was at liberty to tear them from

* This Archon's name was Hippomanes, a somewhat unfortunate one for such an act. He also discovered a similar punishment for his daughter, whom, having been debauched by a citizen, he shut up with a wild horse, without food, to be devoured alive. Suidas says, there was a place in the City of Athens, called ἵππος καὶ κόρη, in memory of the horse and the young girl.

her. Æschines adds, that he was allowed also to beat her.

The only other observation on the punishment of Adultery, seems to be that of Demosthenes, who states a consequence of this crime to have been, in *his* day, a kind of privation, similar to our suspension ab ingressu ecclesiæ. The adulteress (he says) was forbidden from entering any public temple on pain of suffering any punishment except death.

These, then, are the penalties of Adultery by the laws of Greece; on which we may briefly remark, that, various as they were, they all appear to have been as severe as they could have been, not to be capital. This last they were only under certain circumstances, though Plato made a law, that, whoever should kill an adulterer, should be exempt from punishment.

We pass now to their views of ***Divorce.***

In respect of Divorce some little analogy is observable in the laws of Greece to those of the Mosaic Institutes, although, generally, considerable variation prevailed.

Divorce was often permitted for slight causes in *some* parts of Greece, for the laws differed greatly in the several districts. In

Crete, the fear of too numerous a progeny was an authorized ground of separation.

The Athenians permitted slight considerations to lead to it. Perhaps the laxity of *their* laws, as well as those of the Romans, presently to be considered, above those of the Hebrew, may be partly explained by the circumstance of their not having received a law from Heaven; they might thus deem themselves under fewer restraints in contracting marriage and dissolving it. It was sometimes the case, that the matrimonial union was severed by the *consent* of both parties, when they were at liberty to dispose of themselves in a second marriage. Plutarch mentions one of this kind in the Life of Pericles, who, not being able to agree with his wife, parted with her to another man, and, with *her consent*, was himself united to the celebrated Aspasia.*

The Spartans, on the other hand, far from delicate, as they were, in the choice of their wives, yet seldom divorced them; but perhaps this infrequency of Divorce did not originate in causes the most pure and virtuous. Allusion has before been made to the custom

* Plut. in Vit. Pericles.

of lending and borrowing a night's rest in a *neighbour's* bed.

Although the Athenians permitted Divorce, yet it was not without *some* restrictions; and certain rules must have been observed to render the separation legal. The parties were obliged to *give a Bill of Divorce* containing the reasons for the act, and which, if the party divorced made an appeal, was to be laid before the chief magistrate for his approval.

Demosthenes states, that he who divorced his wife was to restore her portion, or to pay, in lieu of it, nine oboli every month; if he refused, her guardian might prosecute him in the Odeum with the action called σιτου δικη, (actio de alimentis,) for her maintenance.*

So far Divorce has been considered as a remedy which might be sought, attended with some cost and inconvenience to the party, who might purchase it, or not, at his option; but, in reference to *Adultery*, it assumed a very different aspect. In this case, Divorce was not *optional*, but *compulsory*. Demosthenes states, that the Grecian laws rendered it *obligatory* on a man to put away his wife after the discovery of an adulterous intercourse. No husband was allowed to live with his wife after

* Demosth. in Neæram.

she had defiled his bed; and if he did not put her away, but allowed his returning affection to prompt a condonation, he was to be termed, ατιμος, infamous.

A few remarks are necessary on the permission of this liberty of Divorce to the *women*. It is supposed that the Grecian *laws did not generally allow* this liberty, but it is clear that the Athenians *permitted* the wives to separate from their husbands. They have express provisions on the subject. From a passage in Euripides,* it would seem, that it was thought a scandalous thing for a woman to do so, except on very strong grounds. In that case a Bill of her Grievances was to be presented to the Archon, † called Γραμματα απολειψεως, and this with her own hand.

The terms employed to describe the cases of the husband's parting from his wife, and the wife's leaving her husband, are significantly varied. The former was said to loose the obligation, (απολυειν,) to dismiss; (αποπεμ-

* ——— Ου γαρ συκλεις απαλλαγαι
Γυναιξαν, ουδ' οιον τ' απηρασθαι ποσιν. Eurip. Medea.

† Grotius, on the Institute of Justinian, has this remark: "Athenia mulier quæ repudium marito dare volebat, ipsa eâ de re instrumentum ad magistratum deferre debebat."
Grotius. Instit. Justin.

πειν,) to send away, (αφιεναι,) to cast out, (εκβαλλειν;) but the wife's was merely απολειπειν, to depart, or leave; and the reason is immediately obvious,—the woman was *received* into the man's family, and therefore she could not be said to αποπεμπειν, send *him* away, though she might απολειπειν, *forsake* him, and retire to a scene of greater ease and security.

Of this power of the woman, Hipparete, the wife of Alcibiades, is an instance. Plutarch relates, that, impatient of the injuries done to her marriage bed, this virtuous lady *departed* from her husband, and retired to her brother's house, but she was obliged, by the law, to deliver to the Archon the instrument whereby she sought a Divorce.*

Isæus mentions, in these cases of the wife's forsaking her husband, that a return of dowry was customary.

From all these facts it appears, that the Greeks had not that sense of the binding nature of the marriage vow which appeared in the consideration of the Jewish code; that Divorce was permitted for more trifling causes; that the punishment of Adultery was not capital, except where the parties were caught in

* Plut. in Vitâ Alcibiadis.

flagrante delicto, and that the liberty of Divorce was, by custom, distinctly allowed to the women. In these respects, there was a wide difference between the Grecian customs and the Israelitish: yet the provision and requirement of a Bill of Divorce, the terms of this Bill, γυναι πραττε τα συα, or τα σεαυτου πραττε, uxor res tuas age, &c.; and the making the *personal delivery of this Bill* part of a judicial proceeding necessary to its validity, tend to assimilate it to the case of the Hebrew enactments.

But we pass to the consideration of the view taken of these matters by the Romans.

In the earliest ages of Rome we have accounts neither of the crime of Adultery, nor the use of Divorce; but, as the prosperity of this people introduced a profligacy of manners before unknown, this crime became one of the features of their moral history, and severe enactments were framed respecting it. Laws had indeed always existed on the subject of Divorce, but we shall (as before) first speak of the crime of Adultery.

Several of the Latin poets have made allusion to this crime, from which we may infer that some of the penal consequences which

it entailed on the offender, were of a nature peculiarly disgraceful. The passages are so offensively constructed by the impure imaginations of the writers, that delicacy will not admit of their being cited; it must be sufficient to refer to them. See *Plautus*, in his Pœnulus, scen. 2. act 4, ver. 40; where his Syncerastus is introduced, saying, " Facio," &c. Phœdrus, Fab. xi. lib. iii., which proves the rule, " Quæ venit ex merito deformitas dolenda venit," as consolation to the eunuch, still marking a certain painful demembration as the punishment of this offence. See also Horace, Sat. 2. lib. 1. ver. 44.*

Terence, however, whether he felt on this occasion more modesty than Plautus, certainly refrains from those offensive minutiæ of description, which deform the pages of the other writers. He speaks of the criminal, as bound hand and foot, and prepared to receive the *customary* punishment of adulterers. (" Pars quâ peccatum est resecari.")†

Valerius Maximus relates two examples of this punishment.‡

* Plautus, in his Pœnulus, scen. 2. act 4, ver. 40. Phœdrus, Fab. xi. lib. 3. Horace, Sat. 2. lib. 1. ver. 44.

† Terence. Eunuchus, Act v. Scene v. verse 3.
" Minitatur quod mœchis solet."

‡ Val. Max. lib. vi. cap. i. n. 13.

Diodorus Siculus mentions, that the ancient laws of Egypt made the same provision, though it was for the rape of a virgin, or the violation of a woman, (προσεταξαν αποκοπτεσθαι τα αιδοια.) The punishment of Adultery was to the adulterer whipping, and to the adulteress, cutting off her nose, in order, doubtless, that such a mutilation of her features might prevent the inducement of a repetition of the crime.

Probably, this severe, but not inappropriate punishment (the loss of the offending member) was one rather permitted to be inflicted by the indignant and injured husband, who might have discovered the guilty parties in the act, than one prescribed and executed by the laws. At the same time, it must be remarked, that some nations, in legislating on these subjects, *have* awarded this as the punishment of *less injurious* criminal indulgences. It certainly was the penalty attached in the criminal code of Justinian, to those found guilty of *sodomitical practices*, and the reasoning by which Zoneras justifies it, as "*pœnam plane convenientem*," by analogy to the punishment of sacrilege, "Quid enim? Si sacrilegium commississent nonne eis *manus* amputassem," &c. makes the explanation of the infliction sufficiently plain. On the same analogy, one of King Edgar's

laws made the punishment for *defamation*, cutting out the defamer's *tongue*.

The mutilation of the face is also alluded to by Martial, in the epigram, beginning, " Quis tibi persuasit *nares* abscindere mæcho?" &c.

A mode of punishment adopted in the case of the female offender, and which prevailed among the Romans till the time of Theodosius, is mentioned by the historian Socrates; but it was one, at which the very feelings, which dictate the punishment of the crime at all, must experience the most revolting disgust.*

If, says he, a woman was taken in Adultery, the Romans did not punish her by preventing the repetition of the crime, as in the case of the man, (the difference of sex requiring this distinction,) but by the greatest provocations of her lust, for they shut the criminal up in a narrow lodge, and there compelled her to take her fill of these abominable pleasures, by prostituting herself to all comers, however base or vile: and to make every one apprized of the the execution of the punishment, little bells were rung during the time of execution. This abominable custom, however, the Emperor Theodosius very properly abolished.

The personal mutilations, also, did not con-

* Soc. lib. v. cap. 18.

tinue beyond the time of the Emperors. They made way for even more severe penalties, as the increase of the crime had probably called for such; for Rome, in the after ages, appears to have been characterized by a profligacy, as extensive as was her dominion.

Some writers have indeed said, that capital punishments were inflicted on this and other crimes, in the earlier ages of the Roman Empire; that Adultery, or the drinking of wine, (which the Greeks would allow as the least of all crimes,) were both punished with death, as the greatest offences that woman could be guilty of; for that Romulus looked upon Adultery as the source of impudence, and drunkenness of Adultery.*

* The slightest approach to this last mentioned vice in their women, was peculiarly obnoxious to the Roman people, and subjected them to severe visitation.

Pliny says, it was enough to have tasted wine, or to have stolen the key of the cellar. Nat. Hist. xiv. 14.

It was a custom among them, at marriages, for the bride to salute the attendants, in order to convince them, by her breath, of her innocence of any imputation of drinking strong liquors; so severely was this offence reprobated. Perhaps our own custom of the minister saluting the bride, still retained in many country parishes, is a remnant of this, or rather, perhaps, merely an expression of pastoral benediction and christian kindness.

Both these offences continued for a long time to be punished by the Romans without mercy; and to this cause has been attributed the absence of any separation of husband and wife among the Romans, for many years. Taylor, in his comment on the civil law, says, the length of time has shown the goodness of the law concerning women, for it is allowed, that during the space of five hundred and twenty years, no marriage was ever dissolved at Rome.* But we remark more on this shortly. If the laws of Rome did indeed make this provision, they seemed to have had a beneficial operation, as a *restraint;* but it is certain, that there is no record of the infliction of such a punishment; and it is doubted, whether it existed as a capital crime, previously to the Christian Emperors.

In a case of suspected crime, the husband, together with the relations of the wife, were appointed her judges. This was a sort of domestic tribunal, erected among the Romans, having its chief cognizance over the manners of the people, for the power of the Censors was not of equal extent with that of the Archons in Greece, and this was one mode of investigating Adultery. Montesquieu remarks,

* Taylor's Elements of Roman Civil Law.

that the submission of such a matter to this public inquiry was productive of very wholesome effects on both sexes. " La loi Romaine qui vouloit que l'accusation de l'adultère fût publique etoit admirable pour maintenir la pureté des mœurs; elle intimidoit les femmes, elle intimidoit aussi ceux qui devoient veiller sur elles."*

The attachment, however, of a capital punishment, to the commission of this crime, is perhaps to be traced to the connexion of the gospel with the throne. It was the work of the Christian Emperors ; but the consideration of this will, more properly, fall under the next branch of the Essay, after the laws of the New Testament shall have been examined; and we pass now to the consideration of the Roman laws of *Divorce.*

For the reasons just mentioned, we defer the notice of a distinction, in the nature of Divorce, which belongs to a later period. In the early and dark history of this people, so much perplexity and disagreement in every particular appear to prevail, that it is difficult to say what was the law of husband and wife, and how it was exercised.

* Montesq. Esprit des Loix, lib. v. cap 7.

Sometimes the man is seen clothed with all the arbitrariness of unrestrained marital power, and lording it over the persons of his little empire, with more than Asiatic tyranny; at others, (as before alluded to,) we behold him, like a cool and dispassionate judge, having summoned his wife's relations about him, forming the head of a domestic jurisdiction.

In the vigorous spirit of the old Roman law, the husband, in the plenitude of his power, could dismiss his wife at pleasure and uncontrollably, and the wife had no redress against him, as far as her return to him was affected, but he was obliged to allow her a portion of his estate for her support, if he put her away on slight occasions. The three causes, to which, by the law of Romulus, the power of justifiable Divorce was limited, were *Adultery*, poisoning his children, and falsification or counterfeiting of his keys; and to obtain a Divorce on the first ground, no fine, as in the other cases, was necessary.

Plutarch denominates that law of Romulus, which permitted Divorce to the men, and refused it to the women, as σφοδρον, very hard. Afterwards, this exclusive privilege of the husband was extended to the wife; and, in later ages, both sexes might sue out a Divorce.

We have seen that the Athenians did allow

of this liberty to their women; and we find that this was one of the alterations in the code of Romulus, imported from Athens, and made one of the laws of the twelve tables. The manners of the people had compelled an extension of the original restrictions. And Cicero, in his second Philippic, refers to the new laws as enlarging the freedom of separation. " Mimam suam res suas sibi habere jussit, et *ex duodecim tabulis* causam addidit. Claves ademit, forasque exegit." * An increased facility was thus afforded to Divorce, the policy of which was very questionable; and the proof of this afterwards appeared sufficiently evident.

On the joint testimony of Dionysius Halicarnassus, Valerius Maximus, and Aulus Gellius, we learn that no instance of Divorce occurred, till upwards of five centuries after the foundation of Rome. It was that of Spurius Carvilius Ruga, when Marcus Attilius Balbus, and Publius Valerius, (or as others affirm, Manlius Torquatus,) were Consuls. †

* Cic. Philip. ii. 28. Opera, Tom. v. p. 1988. Edit. Gronovii.

† Dion. Halicar. lib. 2. Valer. Max. lib. 2. c. 4. Aul. Gellius. lib. 4. c. 3.

The cause of this separation was his wife's sterility; and the occasion of it appears to have been, a census taken of the Roman population, when a considerable diminution being observed, the causes of it were believed to be, that the men married only with a view to interest, and, afterwards deserting their wives, carried on unlawful intrigues with other women; to remedy which, the censors obliged the citizens to swear that they would not marry with any other view than that of increasing the subjects of the government.* This oath raised many scruples, and caused many ruptures between husbands and wives; among whom was Ruga, a man of distinction, who thought himself bound to divorce his wife, whom he passionately loved, because of her barrenness, and he accordingly put her away, and married another, and the Divorce was unimpeached by the law.

It is said, he was hated by the people for this act; but Montesquieu attributes this circumstance to the aversion which they felt towards the censors for their interference in this matter, which they considered as a step towards arbitrary power. " C'etoit un joug

* See Anc. Univ. Hist. vol. 12, p. 164.

que le peuple voyoit que les censeurs alloient mettre sur lui."*

No fact in history has perhaps excited a wider difference of opinions than this. Some have questioned its truth, and those who have admitted it, have placed the most varying interpretations on it. Montesquieu, in the former part of the chapter just referred to, first attempts to disbelieve it, and then wishes to account for it on other principles than the mere force of virtue among that people in the early part of their history. " Il ne me paroit (he says) vraisemblable," and soon after adds, if it were so, that this really had been the first instance of Divorce, it is to be ascribed to the fine which was imposed on Divorce by the laws of Romulus, the moiety of the husband's estate to the wife, the other offered to the goddess Ceres, and which fine Ruga was the first who thought it worth while to pay. But these fines were very doubtful, at least as carried to such an extent; and it is difficult to arrive at certainty respecting them. One provision of them shows the imperfect account which we retain of them, the sacrifice which was decreed to the terrestrial deities. Gibbon very properly asks, where

* Montesq. Esp. Loix, lib. xvi. cap. 16.

this sacrifice from the husband's estate was to come from, as the two moieties had already been disposed of. This strange law must either have been imaginary or transient.

On the case of Ruga this elegant writer notices the lavish eulogiums which the rigidness of their laws, and the exemplary abstinence of the people, have received for the absence of any case in which this tempting privilege of Divorce was indulged for a space of so many years; but he considers the fact as speaking an equivocal language; and he contends that it proves the inequality of those terms on which the connexion of husband and wife was formed, and the undue power conferred on the one, with the state of oppressed subjection of the other. "The slave, unable to renounce her tyrant; the tyrant, unwilling to relinquish his slave."* It may be remarked, however, that the story of Lucretia lends confirmation to the account of the early purity of the Roman people.

We have said, that in later times the privilege of Divorce was extended to the women, and they could sue out a sentence of separation, and live alone as well as the men. It was when the Roman matrons became

* Gibbon's Decline and Fall, vol. viii. p. 61.

the equal and voluntary companions of their lords, that new regulations were introduced into their civil jurisprudence, and marriage was held to be dissoluble by the abdication of either party.*

In the course of a few centuries, in which the prosperity of conquest succeeded to the privations and struggles of the previous ages, and introduced corruption and profligacy in its train, this permission was enlarged to a most mischievous extent. The great crime for which separation was to be justified had multiplied in an alarming manner; for, when the Emperor Severus mounted the throne, no less than *three thousand prosecutions* for Adultery had been commenced, and were then pending; but, besides this, on the most trivial pretences, caprice, interest, passion, discovered daily *motives* (*reasons* they could not be

* Juvenal and Martial both allude to the possession of this power by the women. The former, in his Sat. ix. v. 74;

> ——————" Fugientem sæpe puellam
> Amplexu rapui, tabulas quoque fregerat et jam
> Signavit."

The latter, in his 39th Epigram, lib. x. :

> " Mense Novo Jani veterem Proculeia maritum
> Deseris atque jubes *res sibi habere suas.*"

termed) for the dissolution of the marriage union; and the separation was effected, unaccompanied by other solemnities than a mere message, or letter, sent by a slave. This was termed a *renunciation*, because conveyed by a *nuntius*, or messenger.

At first, indeed, additional circumstances were observed. It was necessary to give a Bill containing the reasons of the separation, and the tender of all the woman's goods which had been brought in marriage, (called *repudium mittere*,) or it was preferred in her presence, before seven witnesses, and accompanied by tearing the writings, refunding the portion, and taking away the keys. The woman was then removed from the house. These witnesses were to be Roman citizens of the age of puberty, and the Bill of Divorce was to be after a certain carmen, or form of words; "Res tuas tibi habeto, &c. item hæc," "Tuas res tibi agito: in repudiis, id est, renunciatione comprobatâ, hæc sunt verba;" but in the event of one betrothed, as in the Jewish law also, an opportunity was given of breaking off the contract, and in that case the words varied: "In sponsalibus autem discutiendis placuit renunciationem intervenire oportere, in quâ re hæc verba probata sunt;" "Conditione tuâ non utor."

To the period of Ruga many writers assign the origin of the Roman marriage contracts, introduced, as they who trace them thither state, for the purpose of securing the portions of the women as Divorces became more frequent.

Frequent they did, indeed, become, and for the slightest causes possible. The instances which immediately occur to the classical reader amply prove this.

C. Sulpitius Gallus repudiated his wife *because he had seen her abroad with her head uncovered.* Q. Austilius Vetus, because his wife *conversed with women of low condition.* P. Sempronius Sophus, because his wife *had been seen at a public show.* Cæsar dismissed his wife, and alleged, when inquiry was made into the cause of it, that he would not have the wife of Cæsar even *suspected* of such a crime. Nero dismissed Octavia for her *sterility;* and Augustus put away one of his wives because *he did not like her temper.* Sometimes they separated when they were *tired of each other.* This was called a Divorce *bonâ gratiâ; a repudium sine ullâ querelâ;* perhaps the Consul Æmilius is an instance of this; he dismissed a handsome and fruitful wife, and would *assign no reason for it.* The women were equally prompt in availing them-

selves of the liberty. Seneca's reflection upon them is very severe. He declares, they calculated their age, not by the number of consuls, but by the number of husbands they had had.*

The most ordinary causes of Divorce were, barrenness, age, disease, madness, and banishment. On Coriolanus going to his exile, when he parted with his wife, he intreated her to marry again, and to find a man happier than himself.

One kind of marriage among the Romans was not dissoluble; it was called the *farraeia*, from marriage being the communion of *far*, ζεα, the ordinary food of the ancient Romans.† The rest were too easily broken; and the remedies proposed for the increasing moral evils which arose in consequence, were as inadequate in their nature, as they were tardy

* "Illustres quædam ac nobiles fœminæ, non *consulum* numero, sed *maritorum*, annos suos computant, et *exeunt* matrimonii causâ, et nubunt repudii."

Sen. de Benef. lib. iii. Op. tom. 2. p. 418.

This word *exeunt*, is stated to be *critically accurate*, as it formed part of the phraseology of the dismissal, at least, according to Juvenal:

"Collige sarcinulas, dicet libertus, et *exi*."

Juvenal, Sat. vi.

† Dion. Halicar. ii. 93.

in their application. The goddes Viripláca, "the appeaser of men," was resorted to, in order to adjust the causes of complaint; but it is sufficient to have analyzed her name, to exempt her from any imputation of impartiality. The Censors and the Prætors were also employed in these matters.

Valerius Maximus relates an instance of the former expelling a Senator for unreasonably dismissing his virgin spouse; but it was not until Augustus, who united in himself both the Censor and the Prætor, that this licence of Divorce was effectually restrained.*

By a construction of crime, in that period peculiar to himself, he termed Adultery an infraction of the *laws of majesty*, and made it *high treason*. According to this principle, he accused his daughter and grand-daughter, and punished all their gallants with death or exile. There might be motives of policy influencing this construction, sufficiently powerful to have dictated even harsher measures. These gallants were numerous, and were men of consideration, of whom, the reigning Emperor felt no little jealousy, and this was a ready and plausible mode of removing them from his sight.

* Valerius Maximus. lib. ii. cap. 19.

But this last clause brings us near the third branch of the Essay, the laws of the New Testament. We have passed over the Greek and Roman laws, and a single remark may be necessary to review the whole It will then appear from the passages referred to, that the punishments annexed to the crime of Adultery have exceedingly varied in the severity of their nature, according to the views entertained by the legislators and the people, of the crime itself. Some have regarded it as a capital offence, others as venial; and the penalties have in consequence either been so rigorous as to amount to cruelty, or so ridiculous as to excite a smile. Sometimes death has been the visitation of a crime, which has inflicted a misery, worse than death, on the injured party.* Sometimes the loss of the eyes, as the avenues through which the temptation entered; sometimes the loss of the offending member; at others, only slight pecuniary mulcts, or personal inflictions of the oddest character, mutilation, castration, sometimes compulsorily self-inflicted, and the excision of the ears or nose. The punishments have not only strangely varied, but have been

* Ποσις ξυνοικει ———
———ει δε μη, θανειν χρεων. Eurip. Medea.

of a diametrically opposite kind: in some cases, the offenders were incapacitated from ever repeating their crimes; in others, they were compelled to submit to a public repetition of the guilty pleasure, till satiety had rendered it disgusting, and made those waters which, when stolen in secret, were sweet, more bitter than the waters of jealousy.

With regard to Divorce, we have seen at one time the utmost caution in its indulgence, and the permission of it surrounded by the wisest restraints; but at others, the growing profligacy of the people, over-leaping all the bounds of laws, and compelling, in the use of it, the most licentious liberty. And to those latter periods we may refer, to the jealousies, the strifes, the discords, and the confusion to which the unrestrained exercise of this liberty gave birth; in order to prove how little compatible such a measure is with the real happiness, domestic peace, and security of a state, as little as it is agreeable to the prescribed regulations and natural dictates of reason and justice.

SECTION III.

But we have now a higher authority to consult on these interesting subjects; and we approach to the third branch of the Essay, to examine, with that reverence which is due to a Teacher so wise, so exemplary, and divine, the law promulgated by the Founder of the Christian Faith, in relation to the subject of this Essay, with the opinions of the Apostles, the Fathers of the Christian Church, the usages of primitive Christians, and the edicts of Christian Emperors.

The first public discourse which the Saviour and Lawgiver of the Christian Church delivered in the days of his incarnation, contained his sentiments on Adultery and Divorce. In the Sermon on the Mount, which was a revision of the law of Moses, and a purifica-

tion of that law from all the corrupt glosses put upon it by mistaken and prejudiced interpreters, we find this passage; "It hath been said, whosoever will put away his wife, let him give her a writing of Divorcement; but *I* say unto you, that whosoever shall put away his wife, saving for the cause of fornication, causeth her to commit Adultery; and whosoever shall marry her that is divorced, committeth Adultery."*

This is an important doctrine. The first thing which occurs to the mind, is, that it contains an evident alteration in the old law, less perhaps in the spirit and intention of it, than in some of the permissions which *literally* it indulged.

Here also the reins of restraint are indeed laid upon the corrupt and licentious practices of those times, arising from the false and carnal glosses of the school of Hillel, on the Mosaic code. That code was not, and could not from circumstances, or it would have been characterized by an unbending rigour on the

* Matt. ch. v.

31 "Ερρεθη δε οτι ος αν απολυση την γυναικα αυτου, δοτω αυτη αποστασιον.

32 "Εγω δε λεγω υμιν, οτι ος αν απολυση την γυναικα αυτου, παρεκτος λογου πορνειας, ποιει αυτην μοιχασθαι, και ος εαν απολελυμενην γαμηση μοιχαται."

use of Divorce: a liberty granted by it for *serious* causes, had been thrown wide to include the *slightest*, and now it is restored and restricted to the exclusive occurrence of *one*.

Jesus Christ did not, as some have contended, *abrogate* the Mosaic law; he was a careful observer of it. His doctrine is not that of hostility and opposition to the latter, but of superiority; a superiority rendered necessary by circumstances, as were the less rigid enactments of the Judaical institutes. This is the manner in which Eusebius, Tertullian, Grotius,* and numerous other writers regard it, stating the law from the Mount of Galilee, to have succeeded to that from Mount Sinai, to be the same rule of moral action, expounded and perfected; and as Grabe observes, though its provisions have a novelty, and a difference of sanctity, yet their object is not to throw

* Grotius has stated this forcibly in the subjoined passage. "Nullam juris per Mosem promulgati partem a Christo infringi, at præcepta interim meliora quam lex illa, præsertim quatenus in judiciis observabatur, exigebat." And, on the very subject before us, he adds, "Sensus enim est, lex Mosis ne quid gravius eveniret tibi de uxore judicium indulsit; tu vide ut tantâ potestate humanè utaris, certus nulla Deo placere Divortia *nisi quæ summa necessitas extorsit.*"

contempt on the former institution, but to excuse its unavoidable imperfection, and to complete what it had but begun.

It is thus the Saviour himself explains the old permission; for on the next occasion where we find the Pharisees (disciples, doubtless, of the school of Hillel) approaching Christ, for the determination of the reality of this liberty, or whether its existence had not, in virtue of his interposition, altogether ceased, he expresses himself in a manner which more fully confirms the doctrine delivered by him on the Mount. The passage is in Matthew.* "Then came the Pharisees, tempting him, and saying, Is it lawful for a man to put away his wife for *every* cause?"† This question brings all the fluctuating opinions on Divorce to a point; and the reply of the Saviour should be attentively considered; the "every cause" in the question, evidently alludes to *slight* causes, some infirmity, some unpleasantness in temper or person, or of the same kind and equally trivial. The Saviour commences his answer, by referring to the original institution of marriage, as the correct standard by which opinions on such matters should be regulated, every deviation from which was an evil and

* Matt. xix. 3—9. † Κατα πασαν αιτιαν.

an abuse. *That* origin marked the union as one of a character the most *close*, *intimate*, and *permanent*; if not indissoluble, yet as near the verge of indissolubility, as possible, and certainly not dissoluble on frivolous pretences. "Have ye not read that He which made them at the beginning, made them male and female; and said, For this cause shall a man leave his father and mother, and shall cleave to his wife, and they twain shall be *one flesh?*"* "Wherefore," (this is the Saviour's conclusion,) "they are no more twain, but *one flesh;*" that is, as Leigh remarks, in that sense of the term which implies not the gross and carnal, but the union of the purest chastest love. "What, therefore, God hath joined together, let not man put asunder."†

The reply of Christ is thus far clear, and

* Leigh's Critica Sacra, on the word, רבק, Gen. ii. 24.

In strict accordance with this view is Dr. Clarke's derivation of the term husband. "It comes," he says, "from the two Anglo-Saxon terms, *hus* and *band*; the bond of the house, anciently spelt *housebond*." And he adds; "lamentable is it, when he, who should be the bond of union of the family, scatters and ruins it by his dissipation, riot, and excess."

† Man; the term in the original is ανθρωπος; the article is not prefixed; intending, thereby, *man*, in the abstract and universal acceptation of the term,—no exception by reason

conclusive against the Pharisees. To this they immediately objected the regulations of the Mosaic law, which admitted the separation of the married parties.

It is necessary to blend here the two narratives of St. Matthew and St. Mark.* "They say unto him, why then did Moses *command*" (ενετειλατο) (for the corrupt and licentious glosses of the Jewish interpreters had extended the *privilege* to imply *an obligation*) "to give her a writing of Divorcement," (the form of that Bill has already been stated,) "and to put her away? And he said unto them," as if to rebuke their perversion of his expressions, "*What* did Moses command you?" How is it you read his words? The Pharisees repeat their statement, though with a little alteration, which, perhaps, the manner of the Saviour, indignant at the gross misapplication of the permission, had compelled. "They said,

of sex or condition. Neither the will of the individual, nor the operation of the laws, can dissolve a bond like this, *unless where the permission originates from the very source by which the bond itself was sealed.* No judicial tribunal, on earth, however wise; no custom, however prevalent; no act of legislature, however imperative, can sever a compact, which the God of all has ratified, save for causes which he has intimated, as demanding and justifying the measure.

* Matt. xix. 3—9., and Mark x. 2—12.

Moses *suffered* (επετρεψε) to write a Bill of Divorcement, and to put her away." The reply of Christ contains the explanation already given. 'Now you state the matter more correctly; it was only a *permission*, and this was the reason; "Moses, for the *hardness*" (προς την σκληροκαρδιαν υμων επετρεψεν υμιν, hardness, i. e. such an obstinate and unalterable obduracy of disposition, as to beget its certain offspring bitterness and cruelty towards such as stand in the way of a man's wishes) "for the hardness of your hearts, wrote unto you this precept, and *suffered* you to put away your wives, but from the *beginning** it was not so." 'These separations are a deviation from the spirit of the original institution, and that spirit I mean to revive and restore. Because politic laws are constrained to bear with some things, it followeth not that God alloweth them.'† This sufferance of Divorce was so far from

* Dr. Clarke interprets this, *Brashith*. The Jews named the books of their law from the first word in each. Genesis they termed Brashith, from the first word in it, בראשית, which signifies beginning; and that Christ spake in this way here. In Brashith it was not so; intimating, that the account given in Genesis was widely different, and that there was no divorce nor polygamy in the first family.

† Beza in loco.

a command, that it was merely an exemption from the punishment which the magistrate might otherwise have inflicted on such breaches of contract, and contempt of sacred rites. The creation of but one man and one woman, " (He that made them at the beginning made them male and female,") admitted neither Divorce nor Polygamy. This is beautifully stated by the Prophet Malachi: * " *Did he not make one?*" (one woman,—one wife;) " *yet had he the residue of the Spirit.*" He could, with the same facility, have created many, if he had pleased.† " *And wherefore one?*" The benefit of the offspring is the assigned cause: " *That he might seek a holy seed.* The union and bond of marriage was thus evidently of so sacred a kind as to be incapable of being dissolved by any thing which *does not make them cease to be*

* Mal. ii. 15. In this passage it is observable, that the Prophet, although speaking of all the wives of the nation of Israel, yet mentions the word in the singular number only.

† Tertullian has the same idea; " Plures costæ in Adam et manus infatigabiles in Deo."

Exhort. ad Castitatem.

one flesh, by making that of the one common to some third person.*

On these three several grounds did Christ rest his argument against the Pharisees; the divine origin and institution itself; the example of the first pair, and the evils of separations; and, by a reference to these, explained away all the objections of his opposers. The conversation had been commenced by them with their usual subtlety and malice; they were tempting Christ, and watching for an occasion to commit him, by some inadvertent expression, to the fury of the prejudiced multitude. They knew well enough what his sentiments were on the subject of Divorce, (we have before mentioned them as delivered on the Mount,) and how opposed they were to the generally received interpretation of the word "uncleanness," as given by the School of Hillel, on which we have before remarked, (Divorce for trivial causes,) and they hoped to expose him to popular resentment for retrenching a liberty which the law, as interpreted by custom, appeared to sanction. They knew that which way soever he decided the matter, it would ex-

* Whitby in loco.

pose him to censure.* But our Divine Lord was ever superior to that fear of man, which would prompt a concealment of important truth. He resolutely explains the permission of Moses, and refers it to a cause that reflected no credit on his hearers. It was "for the hardness of your hearts:"† 'lest you should use them in so cruel a manner, as to render their continuance with you a more deplorable condition even than that of widowhood and separation; but henceforth, under the dispensation which is now to be introduced, characterized, as it is to be, by the most entire purity, as it will be by motives and means adequate to the attainment of that purity; henceforth, even this liberty is to be restricted; and I repeat to you the doctrine delivered on the Mount in Galilee; for, from my disciples, I expect dispositions of a more

* Doddridge considers that both the interpretations of Hillel and Sammai were incorrect; that of Hillel, because clearly opposed to the whole spirit of the Bible, and that of Sammai also, because the law provided that Adultery should be punished with *death*; and that a medium between the two opinions would be the most just. We have, however, shown the punishment and the remedy not to be incompatible with each other.

† Who, that knows any thing of the Jewish history, is at a loss for passages to justify the expression of the Saviour, and to acquit him of any harshness in the imputation?

merciful and gentle kind; what was permitted to an uncircumcised heart among the Jews cannot be allowed among you.' It appears that the disciples themselves did not so clearly apprehend their Master's meaning, and were at that time not fully able to reconcile it to the precepts of Moses; when they were alone therefore with Christ, they asked him more particularly of this important subject; and he then gave them an ampler delineation of his intention. It is as follows: "Whosoever shall put away his wife, except it be for fornication, and shall marry another, committeth adultery against her; and whoso marrieth her which is put away, doth commit adultery. And if a woman shall put away her husband,* and be married to another, *she* committeth adultery."

We now see that the Saviour makes the nearest approach to the indissolubility of the nuptial bond, which, circumstanced as human nature is, can be done. He declares the necessity for some permission, but the restriction of it to *one cause*, which is thenceforth to prevail. It would be impossible but that

* Instances of the use of this liberty, by the Jewish women, have already been given. The precedent of Salome followed by Herodias and others.

offences should come, and some avenue is left open to escape the inconveniences which the absolute indissolubility of this bond would occasion.

The clause of exception which has just been noticed as mentioned twice by Saint Matthew, has indeed been omitted in the Gospels of both Mark and Luke: but this *must* be considered as *understood* in the two latter cases, or the harmony of Scripture will be violated: it is impossible to rest the supposition the other way, since the terms are *explicit*, and *repeated a second time*, and therefore cannot be supposed to be mis-stated; whereas no injury is done to the text by the other hypothesis, which holds the excepted case to be clearly and avowedly *understood*. This is the only method of reconciling the statements of the respective Evangelists.

It must be now considered what this one cause really is; and the question resolves itself into the *literal meaning* of the terms employed. The word, in the original, is *Πορνεια*: a term, on the interpretation of which, Selden remarks; "Difficultas, maximè quâ cruciari solent scriptores;" but which, when carefully investigated, does not appear so difficult to define. *Ος αν απολυση την γυναικα αυτου, ει μη επιπορνεια, και γαμησιν αλλην, μοιχαται,*

και ο απολυμενην γαμησας, μοιχαται. Now, *Πορνεια*, in its largest sense, implies *general whoredom;* although, in the Sacred Writings, it is frequently employed to express simple fornication between unmarried persons, as distinguished from *μοιχεια*, Adultery; *ασελγεια*, lasciviousness; and *ακαθαρσια*, uncleanness. But it also expresses whoredom in *a married woman*, incestuous whoredom,* and all kinds of lewdness committed by such; and, by a figure, has been applied to the idolatrous worship of apostate Christians.

The sense, however, in which it is employed by Christ, is to be sought.

That it could never be meant to express *fornication committed in a single state, and before matrimony*, is sufficiently clear. Several writers have diligently laboured to establish this position, but in vain.† Their arguments have chiefly rested on that expression in the Epistle to the Corinthians: "He that is joined to an harlot is one flesh;"‡ and, connecting it with the same

* 1 Cor. v. 1.

† See, particularly, Madan's Thelypthora, in three volumes; and Whitby.

‡ 1 Cor. vi. 16.

expression in the institution of the marriage rite, they contend that this passage ought to receive such an interpretation. But what would be the principle of such an interpretation? It would be, that every casual union, unhappily so frequent in wealthy and populous cities, would become a valid bond of matrimony, render the persons of the parties unalienable from each other, and for ever disqualify the individual who has accidentally united her person with one man, from ever becoming the wife of another. This is an alarming explication of the maxim, "Concubitus facit matrimonium." It would expose the matrimonial contract to an extremity of danger, and involve the operation of it in an extent of guilt that would be perfectly appalling. Besides, this "detestable inference," as it has been properly designated, of nothing more being necessary to marriage than carnal knowledge, would suppose that no such crime as *fornication* could exist: that no woman could be an *harlot;* for she must, before her crime, be a virgin; in consequence of it, a wife; and by a repetition of it, be made an adulteress; and where, then, would be the meaning of those terms by which the crimes of this wretched class of females are denominated and denounced in the Scriptures?

But this is not all; for such an interpretation appears to annihilate the prohibition of Divorce itself; because, if the marriage bond be not dissolvable by reason of the divine institution of marriage, (what *God* hath joined let not man sever;) and if this casual connexion be a valid bond of matrimony, it must follow that God hath been the author of this connexion; and what, then, becomes of his own denunciation, "whoremongers and adulterers God will *judge?*" And, if fornication is to be the sure bond before marriage, Adultery could never be admitted for the dissolution of it, nor for the power of re-marriage afterwards. These consequences appear to have been partially foreseen by the supporters of the hypothesis under consideration, for they admit the power of re-marriage after a dissolution, and this destroys their whole argument; for, if the casual intercourse before alluded to, renders the persons unalienable, much more so would the fixed condition of marriage. But the hypothesis is utterly unsustainable. It has been well stated by the learned Ecclesiastical Judge, who presides in the Court of His Grace the Archbishop of Canterbury, that "No ante-nuptial misconduct can be pleaded as a ground for a sentence of Divorce. The subsequent marriage is justly considered a

waver of all antecedent misconduct. If it were otherwise, consequences the most dangerous would ensue. If the conduct of the one party before marriage could be inquired into, that of the other would be equally open to judicial investigation, and this would render cases of this description so frequent, that no end could be foreseen to the inconveniences that would arise out of it."

Far is it from being wished that the least palliation should be considered as extended to the criminal intercourse of the sexes, under any circumstances. The whole spirit of the Saviour's precepts is directed against it,* and the New Testament must be examined in all its parts; but when consequences so alarming flow from a forced interpretation of a precept, explicable in a much more obvious manner, and productive under that explication of no such results, but marked by a wisdom and a propriety altogether the reverse, it is not difficult to say to which of the interpretations we should affix the probability of correctness.

The interpretation given to the term πορνεια in this Essay, is *Adultery*. True, by the Jewish law, fornication and Adultery were ever dis-

* See, particularly, Matt. v. 28. and Gal. v. 5.

tinguished from each other, both in name and in the mode of punishment. Yet it is clear that the Saviour employs the term here, as a *generic* term, comprehending all licentious sin; but by the *nature of the transaction*, and the *relative situation of the parties*, it is easily to be detached from its general, and applicable to its particular purpose.

And, taking the term in its widest signification, What is *unchastity?* What is *fornication in a married woman?* It is *Adultery.* Adultery, in other words, is a crime *accumulated upon* that offence, which, in all unmarried persons, would be *fornication.** This is the plain and strict meaning of the Saviour. The rule was new. It both surprised and offended his hearers; but he added nothing to relax it. Indeed, on the contrary, he refuses to qualify or soften it, but leaves it just as he had pronounced it. "All men," he replies, "cannot receive this saying, save they to whom

* This application of the term is admitted by Gibbon, he says, "πορνια, as signifying *fornication*, cannot be strictly applied to matrimonial sin;" though, in the passages which contain this observation, he displays his usual acrimony, and seems anxious to reflect upon it, as "an ambiguous term, flexible to any interpretation that the wisdom of a legislature can demand." It is hoped this part of the Essay will discountenance such an insinuation.

it is given; but he that is able to receive it, let him receive it." And thus the best commentators have ever understood it. Selden affixes this meaning to it. So do Hammond, Beza, Doddridge, Scott, and many others.

Selden says, "Priore notione ad conjugium seu Divortium *attinere nequit fornicatio*, nisi de Divortiæ ob stuprum ante nuptias, seu sponsalia admissere capias," and this idea he rejects; and adds, "Secunda igitur, seu quæ significat *Adulterium, seu conjugii violationem denotat*, hic *auferenda, si recte fornicatio illicitum conjugis concubitum.*" And then he subjoins the readings of several versions which all bear the same way.

Ut tam Syro quam Arabi sic acceptam legislati, et interpretatur plerique, (the Syriac and Arabic.) And also the translation of the old Gallican Church. It is subjoined for its curiosity; "Tut cil que lerout leur femmes hors pur acheson de fornication, il la fait estre *fornicaire*, et cil que prenont femme en tel manier lessie, fit *advoutire*." *

Selden's inference is very just on the con-

* "Avoutire est Adulterium."

"Florentini avolterio dicunt."

Du Cange.

vertible terms employed in the first and second divisions of this version. " Plane *Adulterium et fornicatio* hic sumentur pro *synonimis*." Another old version makes them still more clear, by reciprocally employing the terms " lecherie et advowterie." Luther's old version has it " whordom and advowtry." And the references in the margins of our English Bibles, while, in many instances, they show the use of the term fornication to be in its generic character, yet, in others, absolutely require the interpretation of it to be exclusively *Adultery*.

Taverner's translation has the verse thus; " Whosoever shall put away his wyfe, excepte it bee for whoredome, causeth her to play the whore; and whoso marrieth her that is devorced, is an whoremonger." That is, as fornication signifies no more than the unlawful connexion of unmarried persons; this term cannot be used *in this sense* with propriety, when speaking of those who are married.

The meaning of the word is now considered sufficiently clear. Divorce is allowed, but exclusively for the *incontinence* of the married parties; all other is for ever barred. And with regard to this permission, it may be here remarked, that some light may be thrown on the note in page 26, on the law of

Divorce, and that which made Adultery capital; since this allowance for divorcing the adulteress seems to imply, that the law for putting the guilty person to death, was not considered indispensable, at least, under the New Testament.

The next thing that demands attention, is the sort of Divorce which is here permitted. Whether it is such a dissolution of the marriage bond, as to vest a power of re-marriage, or only a separation of intercourse, without affecting the vinculum or bond.

To examine this with accuracy, we must once more go back to the Mosaic law. By that law, the Divorce for inferior causes *was* such a dissolution, as to give full liberty to both parties to marry again.* By the law of Christ, the only alteration that has occurred, respects the trivial reasons for separation; such separation being obtained, it is of the same character, and attended by the same results, as that of the old dispensation: the path to it may be narrowed,

* In the case of Salome, before alluded to, when she divorced Costobarus, the words used by Josephus are, πεμπει μεν αυτω γραμματιον ΑΠΟΛΥΟΜΕΝΗ τον γαμον. She sent him a Bill of Divorce to *dissolve* the marriage.

Joseph. Antiq. lib. xv. cap. 7.

but the issue to which that path conducts, is the same as before; the consequences remain untouched.*

One difference is observable, however, between us and the Jews; for, in case of fornication, the Jews expected no sentence of the consistory; but the power was lodged in the husband to dismiss his wife; he might himself give the Bill of Divorce; but this was never allowed to Christians, *they* have ever required some judicial declaration; with this exception, the results are the same.

The *causes* of Divorce, Christ restricts to one, and as he abstains from any observation on the *sequel*, the liberty which flowed as a necessary result from the exercise of this liberty, it is fairly to be concluded that it continues the same. This is the presumption arising, *primâ facie*, from the Saviour's statement of his alteration, and silence as to the rest. But it has been asked, Would the Divorce obtained by the innocent against the offending party, liberate fully the persons of *both?* Or does not the crime of Adultery, committed against the first nuptial vow, attach to itself, at least as far as the *guilty* party

* See observation of Lightfoot, in page 107.

is concerned, an incapacity of all subsequent marriage?

To this we answer, that as Christ has not restricted it, *we* cannot do so. The new covenant has not swept away the natural and necessary consequence of re-marriage which flowed from Divorce under the old covenant. The toleration of the latter was more ample, the permission given by Christ is more restricted; but this is the entire of the alteration, and whether the licence now granted be wide as formerly, or narrower than before, it is a licence granted for the same purposes, and to attain the same ends; to be accompanied by the same powers, and followed by the same results. The inference, once extended to the many, still extends to the few; for the law of Christ is a modification, not a subversion, of that of Moses, (which latter, by the way, was equally the law of God,) a modification which altered circumstances have since permitted; and where no alteration is specified, the provisions of the former remain the same. The Saviour himself alludes to the conjoining of the two acts, Divorce and re-marriage. "Whoso shall put away and *marry again*," except under certain circumstances, is guilty of Adultery. It is clear, therefore, that the meaning attached by *Him* to the term Divorce, is not merely a

separation of intercourse, but a dissolution of the bond.

It must be owned that there appears, at first sight, something specious in the reasonings of those who would deny this liberty to the *adulterous* divorced person; such a restriction on the guilty may appear more consistent with the principles of justice. But two objections arise to this; first, it seems impossible to separate the two cases; and, secondly, if possible, it might be impolitic, because it might, and probably would, lead to an increase of crime; for it can hardly be expected, that they who were found to violate an obligation so sacred as that which they have broken, would be very scrupulous in a separated state, and more violations of the precept would thus arise from the restriction itself.

The Divorce, then, of the second covenant, is of the same character as the Divorce of the first; it is a dissolution of the contract, and if so, the power of entering into a new and second contract, attends it as before. This reasoning is simple and intelligible, but, for want of attending to it, many errors have prevailed on the subject of re-marriage. To it may be traced the great difference between the opinions of the Catholics and the Protestants, on which more shall be said afterwards. The fornication

clause sustains the arguments of the latter for the liberty of Divorce; and this attended with all its consequences; while the former found their reasons on the general declaration, "What God hath joined, let not man put asunder." Of course, this asserts in their view the perfect indissolubility of the marriage bond.* But this, if understood in all its latitude, would annihilate the permission even of separation, which Christ specially allows; and strange, indeed, it would be, if, upon a subject so vital and momentous as this, the Saviour had expressed himself so vaguely, as, under such a supposition, he must be considered to have done.

This is one mode of reply to the Romanists. In a latter part of the Essay, the decrees of their own Councils shall be shown to be at variance with the opinions of their own Fathers. But, in addition to this, there is an argument, which, resting the view to be taken of this matter only upon their own text, would furnish their complete confutation. They urge, "What God hath joined, let not man sever." We admit the rule; but applied to Divorce, by reason of Adultery, it totally

* See Bellarmine de Matrim.

fails, for that is a cause of severance which is *not of man's devising*, but is the special provision of *God*, and that under both the Mosaic and the Christian dispensations; and the contract which *He* made originally, He made with this exception, and that contract *He* now declares to be severed. What God had joined, *God* also puts asunder. " Ergo ex justâ causâ est marito jus divertendi atque aliam ducendi: *non* enim hos (propter Adulterium) *homo* separat, sed *Deus*."

We see, then, clearly, that the Saviour has never abrogated the liberty of Divorce, as granted by the Mosaic law. The difference in his enactment is not in the kind, but in the degree of the liberty which it affords. Under the former it was considerable, under the latter it is contracted, and brought into a small compass; but still the restriction is far from declaring the indissolubility of the contract. This was not the doctrine of the Old Testament, and it is not the doctrine of the New. Greater impediments are made to surround and encumber the permission of Divorce under the latter dispensation, and that for the wisest and most beneficial purposes: the probability of countenancing a vicious use of this liberty is thereby diminished, but still the permission of Divorce is granted, and the complete liberty

of marrying again *must*, we contend, attend it as a necessary and unvarying result.

Indeed, the very nature of the crime to which Christ has limited the power of Divorce, repugnant as it is to the constitution of the marriage compact, would lead to this conclusion:—What is marriage? It consists in two becoming *one flesh*. Adultery destroys this unity. We infer it dissolves the compact, at least, that the separation which follows, should be of this character.

And, now, another consideration opens upon us; it is that of the identity of rights, liberties, restraints, and remedies, which the law of Christ affords to both sexes in this matter. This was another proof of the religious superiority of the Saviour's code. The Jews did not allow the woman the liberty of Divorce at all, extensive as was the indulgence granted to the man. Cases of the kind had, indeed, been in later times witnessed; but Josephus, who relates them, considers them as an usurpation of an exclusive prerogative pertaining to his own sex; but the Saviour establishes an identity of interests, and an equality of rights. The innocent wife has the same remedy as the injured husband. This mode of reasoning, which places the parties on the same footing, is not unaptly

termed a rule of *reciprocal positions*, and is manifestly more accordant with the dictates of natural justice. And, in reference to this, the unforced interpretation of the Saviour's law is as complete and satisfactory as can be desired.

These sentiments cannot be better expressed, than in the forcible language of Dr. (now Sir Alexander) Croke, in a very excellent pamphlet, addressed by him in the year 1801, to the two Houses of Parliament, on this subject; when the Bill for the punishment and prevention of the crime of Adultery, was made the subject of so much discussion, but, at last, unhappily thrown out in the Lower House.* On this reciprocity of circumstances he argues to this effect. The law of Christ describes the married persons under the same penalties for the com-

* To that pamphlet the Author of this Essay feels himself indebted in the investigation of this part of the subject; and he takes this opportunity of acknowledging the respect he entertains for the talents and principles of its writer. That pamphlet, published twenty years ago, has, it is to be feared, together with the intended alteration of the law on the subject, been for a time forgotten. Happy will the present writer be, if his own inferior production should be instrumental in reviving the attention of the public to a subject of so much interesting importance.

mission of an equal crime under equal circumstances, and possessing also a reciprocal remedy: "Whosoever shall put away his wife, except for fornication, and shall marry another, committeth Adultery." Here is the case of the man. "And whosoever marrieth her which is put away," (except for fornication,) "doth commit Adultery." Here is the parallel case of the woman, involved in that of him who marries her thus illegally put away. The husband of the second wife commits Adultery with her; the wife of the second husband commits Adultery with him. The description is complete, and the unity of sense preserved in both situations; and the precept respecting the woman was necessary. Chrysostom reasons well upon it: if divorced on other grounds, comparing her innocence with her ejection, *she* would feel a self-satisfaction, and others no reluctance to receive her; and she might hasten to a second marriage. But the law stops her; she cannot marry again. — Why? Because she is not divorced; she is merely sent away, and the tie of the first marriage still continues in force. She was no adulteress; she had not committed fornication; if so, the marriage would have been dissolved, but it remains in force. But take now the presumption of her guilt,

What is the situation of the man? Does his tie of matrimony with his first wife remain unbroken? Clearly not. He can therefore be legally united to a second. Then, what is the situation of the wife? Clearly, *she also is at liberty;* for, how can she, by any re-marriage, continue to commit Adultery against one who has not only ceased to be her husband, but is now the proper husband of another? Marriage is continually necessary to the very notion of Adultery. Take away this, and the very nature and name of the offence are gone. How then can a woman, thus legally divorced, commit Adultery? She may be guilty of fornication before she marries again; but any other name would suppose a perpetual Adultery against a husband no longer existing; and this would be equally repugnant to the rules of sound criticism. The essential relation of the propositions in the law of Christ would be destroyed: the first clause of his statement would be read *with* a restriction, the last, *without* one; and this, as Doddridge carefully remarks, is an incorrectness ever to be avoided, because it occasions the necessity of supposing the term (μοιχευω) to be used in two different senses so near together The reservation clause (except for fornication) is not

expressed in the second part of the law, but it must be *understood*, otherwise all the evils just noticed will flow from its omission. This fulness, in one sentence, explaining the more limited mode of expression in the reversed order of the preceding, or subsequent one, is familiar to every reader of Scripture. A very plain one occurs in St. Matthew: "Whosoever will save his life, shall lose it; and whosoever will lose his life, *for my sake*, shall find it."* Here it is evident, that the *quo intuitu*, the spirit and meaning of the act, as expressed in the latter clause, are to be taken in explanation of the former. The ellipsis, in the first part of the sentence, must be supplied by an analogy with the last, as the conditions of the promise, in both cases, are precisely the same. Temporal interests, or an overweaning attachment to this world, are placed in one scale; and spiritual interests, or a supreme attachment to the Saviour, in the other, and the preponderance of these attachments is the subject of the statement in both divisions of the sentence. Whosoever, then, will save his life, *by violating his duty*, shall lose it; and whoso shall lose his life, by *doing his duty*, shall find it, *in the heavens*. And so it is in

* Matt. xvi. 25.

the Adultery law; the particular clause, "except for fornication," mentioned in the first, is dropped in the second part of the sentence: but the mind prepared to retain the impression of it must understand it to qualify the second as much as it did the first. It is then sufficiently clear, that the power of re-marriage follows the use of Divorce; Divorce, for this cause of *Adultery*, to which it is now limited, working a dissolution of the marriage bond; that is to say, the dissolution of the first contract, and the power of re-marriage, are so far effected as to render the marriage of the innocent party, as Dr. Hammond carefully states it, but as we contend, if of one, it must be of either party, not adulterous; while he that should marry again after any other Divorce, save for this one cause, would be guilty of a most unchristian sin. The sexes, too, are both placed on the same footing; this was very important; the restraint was placed equally on the husband and the wife, and the remedy equally imparted to the wife with the husband. Some have carried this sentiment beyond, perhaps, its legitimate bounds; so as to infer, that the husband could not support his claim to a separation on account even of Adultery, unless he himself stood clear and exempt from all imputations of the same kind.

This reasoning was soon afterwards deduced from the doctrines of Christ: "Perinicquum esset ut pudicitiam vir ab uxore exigat quam ipse non exhibet; quæ res potest et virum damnare, atque ob compensationem mutui criminis rem inter utrumque componere vel causam acti tollere." We shall have occasion to notice, in a subsequent part of the Essay, the doubts that have arisen on the legal soundness of this construction. For the present, it may be sufficient to observe, that no place in Scripture appears to have stated, that a woman, who was an adulteress, should be deemed otherwise, because her husband had committed the same crime.

This explanation of the laws of Christ appears the most satisfactory and reasonable of any that have been put upon them; the most free likewise from all inconsistencies, and the most likely to surround the temptation to the crime, and the use of the remedy, with all necessary guards.

In consequence of this, no view of the matter has been so approved and adopted by the learned and pious writers, who have commented upon it. So Eusebius, so Chrysostom, Hammond, Benson, and Dr. Clarke, have paraphrased, criticised, and explained it.

So, likewise, Le Clerc, whose words are very remarkable; "Itaque, nunc pronuncio quicunque usi fuerint eâ licentiâ, quæ inter vos adeo usitata est, dimiserintque uxores *leviore de causâ* quam propter *Adulterium*, et sibi alteras nuptias contrahere licere crediderint; eos, aliâ domum ductâ, dum vivent uxores, a quibus *nec sunt nec possunt esse sejuncti, fore reos Adulterii: eumque pariter, qui dimissam mulierem, quæ viri alius uxor est, duxerit, adulterum futurum.*"

Dr. Clarke, justly termed the learned and acute, enlarges the sentiment, thus; "Whosoever shall put away his wife, and marry another, except only where it be for the case of *Adultery* that the first is put away, shall be accounted guilty *of causing both her and him*, that shall afterwards marry her, to commit Adultery."

And thus, the celebrated Benson; "Whosoever," says he, "shall put away his wife, *except it be for Adultery*, and after such unlawful Divorce, shall marry again, he shall be guilty of Adultery; and whosoever shall marry the woman that is unlawfully divorced, shall also be guilty of Adultery; because the marriage bond is not *dissolved*, and she is legally still the wife of her former husband."

The interpretation affixed by these writers

to the term πορνεια, is sufficiently definite; those which follow respect the latter point of re-marriage. Whitby remarks; "Note, hence, that, according to either interpretation, where it is lawful to put away the wife, *it is lawful to marry again.*"

Thus, also, Lightfoot comments on it. "Our Saviour does not abrogate Moses' permission of Divorce, but tolerates it; yet, keeping it within Mosaic bounds; i. e. in case of *Adultery:* condemning *only* that laxity in the Jewish commentators which allowed it for every cause; and Moses, in permitting Divorce, *permitted the separated to marry again.*"

But the question of re-marriage after Divorce for fornication, is, perhaps, by no one discussed with greater perspicuity, than by the learned Hammond, in his exposition of the law of Christ. To him the passages which have been cited from the Gospels of Matthew and Mark, convey, as he states, ideas so definite on the one cause of Divorce allowed to the Christians, the breach of the conjugal vow, and the commission of Adultery by whosoever divorces and marries again, save in that single excepted case, that as no paraphrase can make them more intelligible, so there is but one question that can reasonably be started respecting them, viz. whether he

that puts away his wife on this one authentic ground, is so perfectly free from the conjugal bond, that he may lawfully marry some other woman, and some other man marry that divorced adulterous wife. The words in Matthew,* he then adds, with distinctness and yet with caution, are favourable to the affirmation, that it *is* lawful in that one excepted case, to marry again.

The nature of a Divorce among the Jews, was the rescinding of the conjugal bonds; the same supposition obtained, both among them and the Romans, that persons, duly divorced, might marry again. Of the Jewish divorced wife, it is expressly said, in Deuteronomy,† she may marry another; and then the form of Divorce, in the Misna, (Title, Gittin, or Ghettin,) was, "Behold, thou art free, and at liberty to marry whom thou wilt," cuivis nubere liceat; and no change being noticed by Christ, in the circumstances *attendant on this Divorce, he considers it fair to infer the continuance of this liberty*. He states, however, with great candour, the objections of those who side with the opinions of several Councils among the Roman Catholic churches, citing, particularly, the apostolical canons, 48; the

* Matt. xix. 9. † Deut. xxiv. 2.

Council of Arles, A. D. 314, can. 10; and one of the Milavitan Council, A. D. 402, at which St. Augustine was present, where the doubts entertained with respect to this liberty, occasioned those scrupulous cautions which afterwards ripened that decree in the Ecclesiastical Constitution of 1597, (the wholesomeness of which it is not meant to impeach,) which enacts, that when Divorces are pronounced, "Monitio et prohibitio fiat ut a partibus ab invicem segregatis caste vivatur, nec ad alteras nuptias alterutrâ vivente convoletur."

But, after all, these observations do not affect the main question. The difference between the two opposing sentiments seems capable of an explanation by reference to the fact not long before alluded to, that the Jews possessed the power of Divorce *themselves;* whereas, with us, it is vested in judicial authority; that authority, of a two-fold character, in the former and inferior of which the judicial declaration of the status of the parties is made, accompanied by the caution against re-marriage, until the superior authority, on a further investigation of the case, might grant a dispensing power for that re-marriage; *a liberty which never could, in a professedly christian country, be for a moment tolerated, unless it were admitted that the Founder of*

the christian laws himself allowed of such a measure.

Thus unanimous are the most approved of the expositors on this interesting and important subject. They have been stated thus at length, because considerable variations of sentiment have prevailed respecting it with some individuals of no ordinary powers, particularly one of the Bishops of Rochester, in a speech, delivered in the House of Peers, on the case of Lord Northampton. But it is trusted, that the answers which these citations afford, sufficiently establish all the positions which have been advanced under the head of the Essay; and the view now taken of the laws of the New Testament, cannot be either more comprehensively stated, or more strongly sustained, than in the language of His Grace the present Archbishop of Canterbury, in the concise but forcible speech delivered by him, in the same House, in the year 1820.

" If it be asked," said his Grace, " whether a dissolution of the marriage contract is sanctioned by the word of God, I am bound to say, that Divorce a vinculo matrimonii *is* consistent with that word. There is an express declaration to that effect in the words of our Saviour. It is true, Divorce is not talked of,

either in the canons of the Established Church, or in the common law of the land. And why? Because marriage lies at the very foundation of civil society, and, therefore, it has been the anxious wish of all countries to protect it, by every means in their power, from dissolution. Yet instances of Divorce have occurred in this country, not only subsequently to the Reformation, but antecedently to that period. And in the Mosaic law, there is also mention made of Divorce, though I am aware, that some commentators say it was for general purposes, and others, for special. The words of our Saviour, however, are explicit on the subject; for they state, that where a dissolution of marriage takes place from any other cause than Adultery, such dissolution may be followed by the party so dissolving it, causing the other party to commit Adultery. I admit," added his Grace, "that the passages in Matthew are not in Mark nor in Luke: but in Matthew the exception is given, and Mark and Luke have the general institution, without the exception. Now I conceive that the passages in which the exception is omitted, ought to be measured by the passage in which it is expressed; for, it is impossible to believe that that was not intended, which was expressed, though that which was not actually

expressed, might yet be intended.* The result therefore is, in my opinion, that the Scriptures have left a special case excepted, for which a Divorce may be obtained."†

* It is observable, that St. Luke himself suppresses the exception *in each case;* thus evidently understanding it tacitly in both; for he cannot be supposed to have opposed the statement of his Master's doctrine, as delivered by St. Matthew, the admission of the exception in *the one clause;* and, therefore, he makes the two cases perfectly parallel, and proves, that the reservation belongs equally to each section of the passage: and thus St. Matthew himself is to be understood, in stating the sin of a second marriage in the woman, to arise from the circumstance of her being put away for a *less cause than fornication.* "Whoso doeth this, *causeth* her to commit Adultery." Here her second marriage was adulterous, precisely because her first offence was not fornication, and her prior marriage was still good.

† In these sentiments the Bishops of London, of Landaff, and others of the Episcopal Bench fully concurred. The former expressed himself, as "entertaining no doubt whatever of the power of *dissolving* the matrimonial bond." The latter stated, that, "according to the law of the land, he knew no other cause of Divorce, than Adultery; and no other punishment of Adultery than Divorce. As to the Christian law, it certainly provides that *dissolution* of marriage may take place in any case of Adultery, for there is no qualifying clause in our Saviour's injunction."

These then are the chief features in the doctrines, promulgated by the Saviour of men, on the subjects of Adultery and Divorce.

We proceed to remark, now, on the sentiments of the Apostles, and the Fathers of the Christian Church, at least, as far as they can be collected from such records as have descended to us.

All the Apostles are strong in their condemnation of the crime of Adultery. They say nothing, however, of the secular and temporal consequences of it. On these we shall have occasion to comment presently; but they all concur in denouncing the future judgments and wrath of God against "the seed of the adulterer and the whore." St. Paul's Epistles, however, contain a few remarks more to the point of the present Essay. They are to be found in those written to the Church of Corinth, and appear to have been drawn from him as replies to certain questions, which, on this subject, like many more on other matters, were proposed for the solution of his experienced and enlightened casuistry. The chief passages alluded to, are the 4th and 10th to the 14th verses of the 7th chapter of the 1st

Epistle.* The fourth verse is a very strong declaration of the power and authority, which, in marriage, are reciprocally conferred by the wife and the husband over each other's persons. The words are these: "The wife hath not power of her own body, but the husband: and likewise the husband hath not power of *his* own body, but the wife." This also confirms the explanation of an identity of rights possessed by each party in reference to the other; and, when compared with the Saviour's law, restricting the liberty of Divorce, and the dissolution of this sacred contract to an act which, depriving one of the parties of this right, would vitiate the obligation on the other side, it exhibits the beauty and reasonableness of the law with great effect.

The Apostle then proceeds to comment on the law of Divorce itself: "Unto the married, I command, yet not I, but *the Lord:* Let not the wife *depart*" (χωρισθηναι, be separated, i. e. by Divorce voluntarily obtained by herself,) "from her husband." Here, again, is a recognition of the sacredness of the obligation, and a prohibition conclusive against separation on frivolous pretences. "But, and if she *depart*," (εαν δε και χωρισθη; i. e. but

* 1 Cor. vii. 4. 10—14.

even if she be separated, or divorced by him; " let her remain unmarried, or be reconciled to her husband. And let not the husband put away his wife;" (or, I also command the husband not to put away his wife; και ανδρα γυναικα με αφιεναι.) This passage of the Apostle's writings has been thought by some to clash with the permission of re-marriage, as afforded by Christ, and to sanction the opinion of the perpetuity of the rite as entertained by the Romanists. But the opinions of the disciple and his Master are perfectly reconcileable. Indeed, the Apostle expressly states it is his Lord's command that he is expounding. Christ gives the liberty of a second marriage after Divorce *for Adultery*. St. Paul states, that the liberty is withheld from such as *separate for inferior causes*. It is obviously not of Adultery that he is writing. It is of a separation begun on the part of the woman for offences short of Adultery; and in such cases she is properly admonished to be temperate in her conduct. The Apostle had observed that frivolous pretences for separation were frequent among both Jews and Gentiles, and he takes occasion to remark, that as they did not justify the separation, so neither did they dissolve the bond of marriage, and therefore any re-marriage would be Adultery

against a previous contract as yet undissolved. It is this he reprehends. The wife must not leave her husband: or, if she had left him, she must not marry again. She should rather make every sacrifice to effect a reconciliation and a return. The same duties devolved on the husband. The exception, however, is necessarily implied of that breach of the nuptial contract which has been last considered; for, that the Apostle is not speaking of Adultery, is clear from the close of the passage; " Let not the husband put away his wife." Now, it was well known, that the husband *was* permitted to do this for *Adultery;* and the Apostle would hardly contradict his Master: yet, he says, the husband must not dismiss her. We must clearly, therefore, apply the restriction, as St. Paul intended it, to other and less causes than that of Adultery. Another circumstance, deserving of notice, is, that the Apostle is writing, not to Jews, but to *Gentiles;* to the Corinthians just recovering from the laxities of Paganism, some of whose licentious liberties on these subjects have been noticed in the second division of the Essay; and this may further account for the strength with which he expresses his admonition against the rash abandonment of either party for trivial causes, and a subsequent and spontaneous re-marriage.

The Apostle then states one more case; it is that of a marriage between a christian convert and an unbeliever;—a case not contemplated by the statement of Christ; and for this obvious reason, no such case existed; and therefore the Apostle's expression is, "*to the rest*," that is, to others, whose cases were not included in the former consideration; to such, "*I* command, not the Lord."

A contract between persons of such opposite principles and sentiments must have occasioned the sorest inconveniences; and all such connexions were greatly to be deprecated; but it is to the case as already existing, that the Apostle's remark applies. It was from a predominance of an apprehension that the mixture with Gentile families might violate the purity of Christianity, or tend to throw the married believer back again to the pollutions of Paganism, that the first converts looked upon their marriage as actually dissolved if one of the parties still remained in infidelity. The case was submitted to St. Paul; and, with the most cautious deliberation, he states his opinion on the matter, declaring it to be only his own, although as agreeable, as he could collect it, to the divine will. His first object is to check these precipitate Divorces. "If any brother" (that is, a Christian) "hath

a wife that believeth not," (an infidel, or heathen,) " and she be pleased to dwell with him, let him not put her away. And the woman" (a christian woman) " which hath an husband that believeth not," (an infidel or heathen,) " if he be pleased to dwell with her, let *her* not leave *him*. For the unbelieving husband is sanctified by the wife, and the unbelieving wife is sanctified by the husband."* That is, supposing such a marriage to have been formed, let it not hastily be dissolved, for fear of the scandal that might be brought upon the church thereby. Although the Saviour had given no express rule on the subject; for, while he remained on earth, there were no Christians who had heathen husbands or wives, yet the Apostle considered himself authorized to enjoin, that, notwithstanding this difference of religion, the union was honourable if maintained in fidelity and forbearance; and so would the issue of it be; " else were your children unclean; but now they are holy;" the root being holy, so are the branches.

Thus one of the great evils which those who submitted this case to the Apostle's consideration, had in contemplation, would be removed; viz. the fear of the Christian parent

* 1 Cor. vii. 12—14.

respecting the state of the offspring. One infidel parent, it might be apprehended, (and it must be remembered that the state of religious discipline, in those primitive times, was, like all their religious opinions, of a far more simple and rigid nature, than those of after ages,) one infidel parent might occasion for its child an exclusion from the Christian Church, and render it unfit for the initiatory ordinance of baptism. But the argument of the Apostle removes this serious inconvenience, the defective religious state of the one party is to this extent remedied by the faith of the other, and the benefits of a connexion with the Christian Church, are transmitted to the offspring unimpaired.

So far the case is clear, proceeding on the supposition that the parties were desirous of the continuance of the connexion; but this supposition removed, the whole complexion of the case is changed. If the yoke, he adds, is found too irksome on such a serious consideration as this, and a separation take place, it need not be resisted. "If the unbelieving depart, let him depart;* a brother or a sister is not under bondage in such cases." On this important passage, the opinions of the

* 1 Cor. vii. 15. Ει δε απιστος χωριζεται, χωριζεσθω.

Fathers and Commēntators have considerably differed; as they have severally regarded the Apostle as speaking of a *perpetual* or a *partial* desertion.

The passage in question evidently supposes the believer to have endeavoured all means of securing the continuance of the union, but without effect; that the separation has been the act of the other party, who has perhaps sought to annul the contract, and entered into a new engagement. If this had actually occurred, no further resistance need be made. The brother or sister is not enslaved; the re-marriage of the unbeliever is an adulterous intercourse, and would, in consequence, open to the injured party the remedial resource specially permitted by Christ. It is on this supposition, that the comments which have been made on the term, "is not under bondage," ου δεδουλωται, and which would apply it to a relaxation of the restraint from re-marriage, can alone be justified. Poole declares, on this passage, that "Christians are not under bondage, by the laws of God, to keep themselves unmarried on account of the perverseness of parties who have *broken the marriage bond.*" Macknight states, that he "sees no reason why the innocent party, through the *fault of the guilty*, should be exposed to

the danger of committing Adultery." And so Whitby states it: " A brother or sister is not enslaved after all means of peace have been in vain attempted, and the unbeliever *hath entered into another marriage, or rather hath dissolved the former by Adultery*, as may well be supposed of those Heathens who thus separated from their Christian mates. An interpretation which he seems to think confirmed from the former words relating to the case of the believers; if *they* depart, let them remain unmarried, it not being probable, that believers would dissolve the marriage by Adultery." So far the supposition may be allowed. But what, if *no* such adulterous act had followed the separation? What, if merely an interruption of the ordinary intercourse of married life had been the case contemplated by the Apostle; a desertion by the one party, of the society of the other, by reason of a change of religious opinions? Surely the Apostle cannot be supposed to have regarded the bond of matrimony as dissolved on grounds like these, and that a second marriage might be resorted to. Rather, the admonition to the separated Christian wife would, in such case, be considered applicable; " If she depart, let her *remain unmarried*;" the former contract is not dissolved, and nc

violation of it, of a criminal character, ought to be thought of.

And yet, this case has, by some of the ecclesiastics, been contended to have clearly allowed of a second marriage. They have regarded an *ingressus in religionem*, as a kind of *mors civilis;* and, "if the husband be *dead*, the wife is loosed from the law of her husband." In particular, a canon (the 118th) of Egbert, Archbishop of York, anno 750, states this second marriage to be lawful. "Si vir, sive mulier ex consensu religionem ceperit, licet alterum accipere novum conjugium." This is a fearful liberty. It would have been well had the sentiment remained exclusively appropriated to the darker ages of the Church; but it has descended too far into the comment of more modern writers.

To such remarks, three answers may be given:

1. That St. Paul has himself determined the point otherwise, in verse 11; "If she even be separated, let her remain unmarried." And therefore he could not be supposed, in so short a compass, to contradict himself.

2. He must, under this supposition, be regarded as designating a yoke imposed by his own Master, a grievous bondage, δεδουλωται. Far more natural is that interpretation of the

term which would apply it to a release from the marital authority, as far as that would have urged the painful necessity of following the unbeliever to his false religion. This *would be* δουλεια, *deep servitude;* to be compelled to the abandonment of the ordinances of the Church, and the Christian worship of the true God. But the obligation of the marriage vow does not extend to this. A brother or sister is not *thus* under bondage.

3. The same liberty would extend to the divorced as to the deserted wife; (i. e. divorced for causes less than adultery;) the former being, in many cases, equally innocent with the latter: and yet the second marriage of such divorced wife is expressly forbidden by Christ; and thus a door would be opened to the most direct perversion of Scripture, and the most pernicious consequences in married life.

This is perhaps the true meaning of the Apostle's opinion; it must be confessed it was a nice case, and involved some intricacies; yet he concludes it, as he does all his arguments and discussions, with some fervent exhortations to christian unity and peace, as if the impression he wishes to leave on the minds of his hearers were, "if it be possible, as much as lieth in you," avoid these separations and

divisions; for, "what knowest thou, O wife, whether thou shalt save thy husband, or how knowest thou, O man, whether thou shalt save thy wife?" and, "God hath called us to peace." 'Bear with christian fortitude and patience the burdens of your present painful lot, trusting that at length a divine influence may rest upon your kindness, your example, and your prayers; and he whose province it is to "make men to be of one mind in an house," may at last reconcile your differing sentiments, and make you one in spirit, as you already are one in lot.'

In advancing now to the opinions of the Christian Fathers, it may be remarked as not a little strange, that clear as the doctrine of their great Leader was, so many differing opinions should have prevailed respecting it.

Before, however, entering on this part of the Essay, it may be well, in order of time, to notice the statement of that remarkable and celebrated work, the Pastor of Hermas; and this, because to it may be traced, as to its most probable source, all those opinions concerning the indissolubility of marriage, afterwards with so much eagerness adopted by the Latin, and with equal determination

rejected by the Greek Church; and which, with the exception of a few temporary changes, lay floating in the Western Church, till, what has been justly termed, "the improvident orthodoxy of the Council of Trent," fixed it for ever on the acceptance of the Catholic believer.* But this doctrine did not remain exclusively in the creed of Rome; it is notorious, that after the Reformation, this country adopted the whole of its marriage rites from the canon law, and constructed therefrom its marriage laws, both as to their matter and form.

It is in consequence of these circumstances, that the work of Hermas is particularly noticed. Hermas was an ecclesiastical writer of the first century, and, by some of the early writers, is stated to be the same person whom St. Paul notices at the close of the Epistle to the Romans.† His work was written in Greek, shortly after that Epistle, or at least, during Domitian's persecution, which hap-

* Vide Ayliffe's Parergon, p. 48.

Ayliffe, however, states his own opinion to be otherwise. Speaking of the second punishment of Adultery, a thoral separation, or a dissolution of matrimony; he says, "*For the bond of matrimony may be dissolved by Adultery.*"

† Rom. xvi. 14.

pened in the year ninety-five, and before the canon of Scripture was closed. Many have supposed that it formed a part of the canonical writings; others only regard it as of apocryphal value and authority, which is perhaps the most correct opinion: but it was generally received and accredited, and soon acquired repute among the Latin Ecclesiastics.*

It was termed Pastor, because it represented an angel, addressing the writer, under the form of a shepherd.

The work is divided into mandates, visions, and similitudes; the former of which form by far the best part of the work. In the fourth of those mandates, we find the following dialogue between Hermas and the angel shepherd:

"Dixi illi; Domine, si quis habuerit uxorem fidelem in Domino, et hanc invenerit in *Adul-*

* The Greek text is lost, but a very ancient version of it is still extant. The best edition of it is that of 1698, where, together with the other Apostolical Fathers, it is illustrated with the notes and corrections of Cotelerius and Le Clerc. Archbishop Wake translated them into English in 1710. Irenæus, Clemens, Tertullian, Origen, and Athanasius, all mention Hermas in terms of respect; and the Latin translator remarks; "Priscis ecclesiæ seculis, si Eusebio et Hieronymo fides, liber hic *valde utilis* habitus est, et propter eos qui primis ad fidem institutionibus imbuuntur *necessarius* judicatus."

terio, nunquid peccat vir, si convivat cum illâ? Et dixit mihi: Quamdiu nescit peccatum ejus, sine crimine est vir vivens cum illâ. Si autem scierit vir uxorem suam deliquisse, et non egerit pœnitentiam mulier, et permanet in *fornicatione* suâ, et convivit cum eâ vir, reus erit peccati ejus, et particeps *mœchationis* illius.* Et dixi illi; Quid ergo, si permanserit in vitio suo mulier? Et dixit: *dimittat illam vir, et vir per se maneat.* Quod si dimiserit mulierem suam *et aliam duxerit, et ipse mœchatur.* Et dixi illi: quid si mulier dimissa pœnitentiam egerit, et voluerit ad virum suum reverti, nonne recipietur à viro suo? Et dixit mihi: Imo, si non receperit eam vir suus, peccat, et magnum peccatum sibi admittit, sed debet recipere peccatricem quæ pœnitentiam egit; sed non sæpe. Servis enim Dei *una* pœnitentia est. Propter pœnitentiam ergo non debet, dimissâ conjuge suâ, vir aliam ducere. Hic *actus similis est et in viro et in muliere.*"†

If there is such a thing as excess of virtue, it dwelt in the heart of the writer of this pas-

* It is worthy of notice, that the alternate use of the terms, fornicatio and mœchatio, here applied to the sin of the married woman, tend to corroborate the interpretation given in page 89 and 92, of the term πορνια.

† Versio Latina. Oxon. 1685, p. 49, 50.

sage, and certainly must have prompted the sentiments it contains. Where else could he have obtained them? Not from the Founder of Christianity; not from St. Paul; nor yet from St. Peter, that the Romanists should place such reliance upon them. The latter has been silent on the subject under consideration, and both the former, as has been proved, sanction a liberty which this writer ventures to narrow, when he asserts, in the most unqualified manner, the Adultery of re-marriage in both the innocent and guilty party.

We may admire the scrupulous piety of this writer, but we *must* question his accuracy on the marriage law. He is correct in placing the two sexes on the same footing; so that, as Whiston, in his notes on Josephus, says, "the innocent wife could divorce her guilty husband, as well as the innocent husband divorce his guilty wife;" but not so, in considering them as so bound to each other, as that not even the crime mentioned by the Saviour can loose them again. This, however, was the doctrine of Hermas.

We pass to examine the opinions of others; and that of Origen presents itself as forming a remarkable contrast to the strict views of Hermas. He gave a wider interpretation to

the Saviour's rule, than the observations in the preceding part of the Essay contain, and appeared disposed to favour the interpretation of Hillel, considering *uncleanness* to signify any crime almost of which a woman might be guilty. He wished, also, (according to Grotius,) to affix to the term πορνεια, a much more extensive interpretation than the foregoing; considering it to mean, as a *generic term, one instance*, selected out of many, to characterize the conduct for which a separation might be effected.* He states several other cases, poisoning, robbing her husband, &c. concluding by saying, "I am of opinion, that the Son of God did not mean to limit the power of Divorce to the cause of *fornication*, but only to show the *kind* of cause which would render such a measure justifiable." He mentions several Bishops of his day, who allowed divorced women to marry again, but chiefly to avoid incontinency: Origen himself did not approve of it.

It is trusted, that the comments already made on the law of Christ have sufficiently answered, by anticipation, the observations of the subtle and philosophic Origen. One additional remark may be made, and that is, that

* Grotius in Origen.

this interpretation, in order to be deduced from the words of Christ, requires an alteration in the sacred text, (instead of "εἰ μὴ ἐπὶ," to "μὴ ἐπὶ," &c.) a circumstance very scrupulously to be deprecated.

The venerable Bede (and it may be proper to notice here, that the classification of opinions has rendered necessary an occasional departure from the strict line of history) owns that several, in his sphere, had put away their wives, not only for Adultery, but also on a religious account, lest they should make shipwreck of their faith. This was similar to the Divorces already noticed in Ezra's time.

St. Augustine, in his Retractations, shows, that in his time, people were divided on the meaning of Christ's words, and that very many interpreted them as Origen did.

But the most universal and probable opinion is, that which understood the observation of Christ in its *literal sense*. Most of the Fathers and Commentators have explained it in this manner; and though the laws of man have tolerated Divorce on other grounds, yet, say they, it was not on that account in the divine sight more lawful. The question then again returns here, Under such a Divorce, could the parties marry again? Here two great divisions of sentiment meet us; that of

the Eastern and Greek Churches, sanctioned, as we contend, by the Mosaic law, by the Saviour, the Apostles, and even the early Fathers of the Latin Church; and that of the Church of Rome, traced up in the first instance to the scrupulous notions of Hermas, and afterwards kept alive by the rigid affectation of austerity, imposed by monastic and ecclesiastical discipline.

It would be endless to enumerate all the variations of sentiment expressed by the different Fathers and Representatives of the Churches. Calmet has stated some of them in his Antiquities with minute detail. He particularly notices Lactantius and Tertullian, who both maintain that marriage is rendered null and void by Divorce; the latter observing it, as his conviction, that the Son of God had limited the separation to Adultery, as its exclusive cause. Lactantius has also some admirable remarks on the equality of the condition and privilege of the wife with that of the husband. He considers the Apostle Paul to have imbibed thoroughly the spirit of equity displayed by his Divine Master, in annihilating all invidious distinctions in the relative privileges of the two sexes; or, in the words of an elegant writer: " Fidèle interprète de la pensée de son Divin Maître, il ne se con-

tente pas de donner au mari un droit sur le corps de son femme; il donne le meme droit *à la femme à* son tour sur le corps de son mari; etablissant ainsi une egalité de droits entre deux personnes qui font qu'un seul corps;" and then he adds; " un mari doit par son exemple apprendre à sa femme la chastité qu'il a droit déxiger d'elle." But even Lactantius and Tertullian differ on parts of this subject. Tertullian thought it unlawful for divorced persons to marry again,* Lactantius did not.

Just as is the comment of this Father on the reciprocity of rights of the wife and the husband, yet it has not universally followed, that they have been placed on the same footing. St. Basil, in one of his canonical epistles, speaks of the laws as strict against the adulterous woman; yet adds, that *custom* forbids the woman to leave an adulterous husband; and the Greek commentators on the apostolical canons, say the same thing. There are instances to the contrary, however, in the

* There appears a variation in the statement of Tertullian's opinion on this matter; but perhaps it may be reconciled, by supposing him to allude, in the first instance, to Divorce obtained for Adultery as its justifiable cause; in the latter for less serious reasons, and such Divorces he did not consider sanctioned by Christ.

Western Church; two cases are mentioned as having happened, by Justin Martyr, (in his Apology, written within fifty years after St. John died,) and St. Jerome, showing, that the women sometimes adopted this practice. The one was of a Christian woman, whose husband's vicious course of life at last compelled her, notwithstanding the *intreaties of her relations and friends*, fearful, perhaps, of this innovation on established usage, to send him a Bill of Divorcement, and to leave him; the other case was that of the celebrated Fabiola, who divorced her husband and married again. The man was a complete profligate; and Justin, in citing the case, *commends* it, saying, the measure was taken "*οπως μη κοινωνος των αδικηματων και ασεβηματων γενηται, μενουσα εν τη συζυγια και ομοδιαιτος και ομοικοιτος γινομενη*:" but St. Jerome, in stating his case, mentions the second marriage to have been contrary to the rules of the Church, and that penance was done for it afterwards. This is difficult to reconcile with some observations of St. Ambrose, who quotes several Councils, particularly of the early Gallican Church, wherein this liberty of remarriage appeared to be countenanced. That Father has some spirited remarks addressed to the men of his age, in deprecation of the

frequent use of this liberty of putting away their wives.

"To leave one's wife, except for Adultery, is not only to transgress the precept of Christ, but to destroy the work of God. Can you be so hard hearted as to commit your children to a step-mother, and that in their mother's life time? Suppose the wife does *not* marry another, how can you dislike a person who continues faithful to you, although you act unworthily to her? And if she *does* marry, does not the blame of her being an adulteress fall upon you, since, by your unjust dealing, you compel her thus to act?" *

The Apostolical Canons contain an express prohibition of a second marriage after Divorce. The Popes Siricius, Innocent, Leo, Stephen, and Zachary, in their Decretal Letters, strenuously condemn such marriages, and give them the name of Adultery.

But we must not pursue this part of the history at present, it more properly belongs to the next head of the Essay; and, under this, there yet remain to be noticed the Enactments of the Christian Emperors, to be col-

* Amb. in Luc. l. 8.

lected from the Institutes, the Digests, and the miscellaneous Decrees.

By the Institutes, we find the definition of the crime much more restricted than that which is given by the Fathers. The latter is that which has been given of it throughout the Essay. The Institutes,* however, limit the crime to the married woman. The terms are "Adulteria est *alieni thori violatio*, sive coitus cum *alienâ uxore factus*." Distinguishing it from the crime stuprum, "Quod cum *virgine*, vel *viduâ* fit," by saying, "Jure *civili*, Adulterium *cum nuptâ tantum* committitur." But by the canon law, Vinnius adds, it is otherwise; "Jure autem canonico committi intelligitur, sive *solutus cum conjugatâ, sive conjugatus cum solutâ, aut conjugatus cum conjugatâ*." These widely differing opinions are attempted to be each supported by reference to the sacred writers. The Institute states, that, "Adulteri dicuntur *alienarum nuptiarum temeratores*;" and that this definition, "a sacrâ scripturâ veteris Testamenti non abhorret;" referring to Levit. xx. 10.; Deut. xxii. 22.; and Gen. xxiii. While the Canonists embrace the more extended interpretation of the crime; (hanc sententiam omnes fere Theologi

* Vid. Vinnii Com. Instit. Justin. Lib. iv. tit. 18. p. 903.

plectuntur,) and support it by reference to Matt. xix. 9.; Mark x.; and Luke vi. 18.; besides the strong passage in 1 Cor. vii.

It is, on the clear and equitable parallelism of the reciprocal duties and relative rights of the two parties as established by the Saviour, asserted again by his Apostles, and not less concurring with the suggestions of *natural law* than with the almost unanimous opinions of the Fathers of the Christian Church, that the understanding received throughout this Essay of the nature of the crime of Adultery, has been founded, and is considered to be that which would extend it to mean *the violation of the nuptial contract by either party;* and no matter with whom; " Conjugatus cum solutâ, vel conjugatâ; conjugata, cum conjugato vel soluto." *One* of the parties must be under the matrimonial vow. This is essential to the crime " accessio ad alterius thorum;" but then it may be varied in a three-fold manner, " ex parte viri, vel feminæ, vel utriusque." The one may certainly become a crime of deeper and more complex dye than the other; yet is the latter justly deserving of the name of this crime; the one may be *double*, yet is the other *single Adultery*.

While remarking the distinctions of terms,

we may observe the three kinds of separations in the civil law. Two of these could hardly be termed Divorces; the first was a separation pronounced between parties whose marriage engagement was not considered legally contracted. The sentence or decree of the Judge declared the contract "nullum et irritum ab initio." These separations were not so much dissolutions of the marriage contract, as judicial declarations that there never had been any contract at all; for the very foundation of the contract was a supposition that no legal let or impediment existed to the valid solemnization of it; and the reason of this distinction is plain: the cause of action, in the one case, *preceded* the tie of the obligation;* in the other cases, now to be mentioned, it *followed* that tie.

The second kind of separation alluded to, was that termed *Repudium*. The difference between *Divortium* and *Repudium* was this. Upon the principle, "*Consensus* non *Concubitus* facit matrimonium," a marriage by the civil law was so far considered binding, that when the contract of the sponsalia was made,

* "Hujusmodi copulatio non est matrimonium, sed Adulterium, seu potius incestus. Non causa Divortii a vinculo matrimonii, sed potius, (quia ab initio non fuit matrimonium,) causa nullitatis matrimonii." Oughton, Tit. 193.

and before the union of persons had taken place, it was capable of the application of the term *dissolution;* and *Repudium* was the word employed to designate the separation of persons in this status in society. *Divortium* was the separation of persons already *married.* So the writers have explained these terms: "Divortium inter *virum* et *uxorem* fieri dicitur. Repudium vero *sponsæ* remitti videtur, quod in uxoris personam non cadit. Inter Divortium et repudium hoc interest: quod repudium etiam futurum matrimonium potest *repudiare;* non recte autem *sponsa divortisse* dicitur, quod Divortium ex eo dictum est, quod in *diversas partes eunt qui discedunt.*" *Repudium*, then, was a dissolution of espousals; *Divortium* a dissolution of marriage. In both, however, a certain form of words was necessary, with various other solemnities; allusion to which has been already made.

In the *Divortium*, however, a two-fold distinction was observable: the one which merely effected a separation of the parties from the intercourse of the married state; bed, board, and mutual cohabitation, (*à mensâ et thoro;*) the other, which was a dissolution of the very vinculum or bond of marriage, and which was for graver causes than the former.

Thomas Aquinas summed up, in a quaint

tetrastic, twelve causes which might found sentences of nullity, of repudiation, or of the two kinds of Divorce; to which, some other, as monkish as himself, added two more lines, increasing the causes to fourteen, and to these were afterwards added two more. The former are contained in the note.*

But we must now notice the penalties attached to Adultery by the Emperors.

It has been erroneously supposed, that the Lex Julia de Adulteriis, condemned the offender to *death*, but it did not; the penalty there was *deportatio* or *relegatio:* although Octavius, perhaps, in one or two instances, overstepped the limits which his own law had prescribed, and put the adulterer to death. It was by the law of *Constantine* that a capital punishment was first inflicted upon those offenders. This account is confirmed by Vinnius, in his comment on the Institutes; his expression is, "*Gladio punit*

* "Error, conditio, votum, cognatio, crimen,
Cultûs disparitas, vis, ordo, ligamen, honestas,
Si sis affinis, si forte coire nequibis,
Si parochi, et duplicis desit præsentia testis,
Raptave si mulier, parti nec reddita tutæ;
Hæc facienda vetant connubia, facta retractant."

Adulter.* Hæc pœna non est ex lege Julia sed Constantini est. Pœna legis Juliæ relegatio erat, ut constat ex Tacito. Certe capitatem non fuisse."† Another writer says; "Primus *Constantinus* capitis pœna Adulterii crimen vindicandum constituit."

Many of the subsequent edicts of the Emperors were so contrary to the Gospel rule, that it is difficult at all to concede to them any pretensions to conformity with Christian principles. St. Jerome strongly animadverts on this opposition. "Aliæ," he says, "aliæ sunt leges Cæsarum, aliæ Christi: aliud Papinianus, aliud Paulus noster præcipit. Apud *illos* viris inpudicitiæ pœna laxantur, et solo stupro atque Adulterio condemnato, passim per lupanaria et ancillulas libido permittitur, quasi culpam, *dignitas faciat non voluntas*. Apud *nos, quod non licet feminis non licet viris, et eadem servitus pari conditione censetur*." This is ever the effectual answer to all those unjust partialities which, men being the law-makers, have so frequently characterized the direction of penal enactments; where, like the fable in Esop of the artist and the lion, a bias is ever displayed in

* Vinn. Com. Instit. lib. iv. Tit. 18. Text. 4. p. 903.
† Tacit. lib. i. Annal. 2 and 3.

favour of themselves. The application of it, we shall discover more particularly in their regulations respecting Divorce. For the present, we speak of the punishment of Adultery.

Under Constantine, then, it was capital. Under Macrinus, many adulterers were burnt at a stake. Under Constantius and Constans, they were burned, or sewed alive in sacks, and thrown into the sea. " Insuère culleo vivos, vel exurere."* Under Leo and Marcian, the penalty was abated to perpetual banishment, or cutting off the nose.

Under Justinian, a further mitigation of this punishment took place; he was contented with scourging, and the loss of dower in the adulteress. He condemned her also, under some circumstances, to be shut up in a nunnery; but he allowed the husband to receive her again at the end of two years; if he was not willing to do this, or if he died before this time, the wife was condemned to be shaved, and to take the monastic habit, and to spend the remainder of her life in that condition. Still the penalty continued death in the husband.† The

* Theodosius, lib. 2.

† " Capitalem autem pœnam Justitianus *in masculis* probat; mulierem vero verberibus clausam in mona-

reason of this difference is stated to be, that the woman was the weaker vessel; but, perhaps, the Empress Theodosia was the author of this, as well as of many other laws, wherein a considerable favour and leniency are displayed in the mitigation of punishments awarded to her sex. This is a further confirmation of the observation on the comment of St. Jerome, in a preceding page.

But Adultery, besides its secular consequences, had to appear before a spiritual tribunal.

By the canon law,* adulterers were said to

sterium detrudi præcipit; datâ potestate marito intra biennium, si hoc existimaverit, eam inde revocandi, quo transacto, aut viro præmortuo, eam raso capite, monastico habitu amiciri et illic omni vitæ tempore manere jubet."

Brissonius.

Another observation is, "Sacrilegios nuptiarum gladio puniri oportet."

This must refer to the case of the wife, *detected* by the husband, in the act of Adultery, and in this event, contemplated by the laws of Solon, and in one of the Novels of Justinian, allowance was made for the irritated passion of wounded affection, and the husband was allowed to kill her; but this permission was thus guarded, he must have previously given the person, whom he suspected of this corrupt intercourse, three successive warnings in writing, not to converse with his wife.

* Can. ix. 10. §. 30.

be "sacrilegious persons," and, therefore, ecclesiastical judges might proceed against a layman for this crime. But that which gave the church its jurisdiction, in matters of this kind, is to be discovered, rather in the partiality felt by the Emperors towards those Bishops, who had been the means of converting them to Christianity. Adultery is not a spiritual offence in its own nature, any more than murder; both are offences against the *second* table: but the Emperors were willing to confer a power on the church of investigating and punishing this crime: and they considered the infraction of a bond, which the church had sealed, a proper subject for ecclesiastical cognizance. Accordingly, excommunication in a layman, and deposition in a churchman, were made to follow this crime.

In relation to *Divorce*, the edict of Constantine, in A. D. 331, to which reference has been already made, was framed particularly with a view to lessen its frequency. Formerly, drunkenness and gaming in the man, had, by custom, authorized the woman to leave him; and slighter causes gave the same permission to the husband; but by that edict, *three* causes were mentioned, to which the licence of separation was

restricted. The man was not to be quitted, unless he was a murderer, a poisoner, or a robber of graves; nor the woman repudiated, unless she was an adulteress, a poisoner, or a corrupter of youth. The imagination is somewhat puzzled, to conceive the reasons which assigned exclusively these vices as the causes of Divorce. About six years after, the same Emperor permitted an absence of four years to entitle to a Divorce. But this was limited to the case of soldiers, whose wives, not having heard either of, or from them, during that period, might marry again.

The first edict of Constantine is ratified by Honorius, Theodosius the Great, and Constantius, in 421. But in 429, this Theodosius (of whom Barbeyrac in Grotius says, "il consultoit fort les Evêques") determined to abrogate it, and, accordingly, he and Valentinian gave a new liberty of Divorce. The exordium of their decree strongly reprobates the severity of the former enactments, and opens the door afresh to new freedom in this particular. But the inconveniences of this were soon felt; and in the year 449, the same Emperor restored it, and limited the permission of Divorce nearly to the same causes as before. One feature in the new law was this, that besides Adultery on the

part of the husband, and the flagrant crimes of poisoning, &c., which entitled the wife to a Divorce, this of *cruelty* towards her was now added, (the Divorce *propter sævitiam*;) cruelty, however, amounting to peril of life. Divorces, by mutual consent, had previously prevailed. This edict, however, altered some of the provisions which attended such separations, and allowed the wife to marry again within *one* year; before, it was not permitted till after a lapse of *five*.

This was the true state of Divorce from the time of Constantine to that of Justinian. This last Emperor added several reasons for separation. He attempted to justify the loosening of the bond of marriage, on the general maxim that, in human affairs, there is nothing lasting or permanent; and that, consequently, *marriages* may be annulled; sometimes, with the consent of both parties, or upon some other reasonable account. The liberty of Divorce was thus rather encouraged than checked, and the passion for monastic vows, and a profession of chastity, tended still more to augment it.

Justinian had, at first, stopt the current a little, but his grandson, Justin, yielding to the prayers of his unhappy subjects, (as it is sarcastically stated by Gibbon,) again restored

the liberty of Divorce by mutual consent; and things remained in this state for nearly three hundred and forty years, about the end of the ninth century, in the reign of Leo the philosopher.

This Emperor made a collection of laws, which he termed *Basilicæ*, from which he excluded the edicts of Justin. One of his permissions of Divorce was for madness that had lasted three years.

This is about the period at which we are naturally conducted to the fourth division of this Essay.

SECTION IV.

We proceed now to consider some of the laws and customs of various countries subsequently to the period of which we have last treated.

We speak, as before, of Adultery first.

The age of which we have now to treat, continued to insist, as far as the influence of the Church extended, that the matrimonial offence should be visited with rigour; and accordingly the Canonists marked their opinion of conjugal fidelity by severe proscriptions of this violation of it. One of the Canons has this passage: "Let adulterers be *stoned*, that they may cease to increase who will not cease to be defiled."

Sometimes, as the punishment of this crime, Divorce has been rendered compulsory on the partner of the offender. The Council of Eliberis in Spain threatened with excommunication the husband who tolerated an adulterous wife. The Council of Neocæsarea, in 314, decreed, that, if the wife of a laic were convicted of Adultery, the man could not be admitted into the ministry; and, if it happened after ordination, he was to divorce her; and if he did not, he could not retain his ministerial function. The Council of Nantz also condemned to a seven years' penance the husband who became reconciled to his wife; and Pope Sixtus Quintus, not content with the death of the offenders, ordained that such husbands as did not make public complaint of the infidelity of their wives should be liable to capital punishment also. But these severities ill accord with the lax morals of the priesthood at that time, and the conduct of the ecclesiastics was at utter variance with the Canons of the Church.

With regard to Divorce; the laws of the western nations have been far from uniform. Some have been extremely strict, and others altogether as relaxed. They have varied greatly also according to times

and circumstances, till at last, the Council of Trent, already noticed, fixed all those that belonged to the Church of Rome, while others that have separated from it have framed laws and edicts as fancy led them. We have before noticed the Decretal Letters of the Popes, condemning as Adultery a second marriage. To this sentiment the Church of Rome, with certain exceptions in the opinions of some of her functionaries to be noticed presently, has since always adhered, and never allowed of marriages, contracted after Divorce, while both parties remained alive. And ever since the eighth century, the Gallican Church has concurred with them upon this point. Pope Gregory II. when writing to the Bishop of Utrecht had said, that if a woman was afflicted with any natural weakness or indisposition, her husband might marry another, but so as to be ready to assist his former wife. But Gratian observes, that this Decree runs counter to the Canons, and even to the doctrine of Christ and his Apostles; and says, it was the opinion of the Latin Church, that the bond of matrimony remains firm, notwithstanding the most lawful Divorce.

The Council of Arles, (Concil Arelatensi,)

held at the command of Constantine, under Pope Silvester in the first year of his papacy, had long before forbidden the men who found their wives guilty of Adultery, to marry again while they were alive. The words were; "Is cujus uxor adulteravit, aliam illâ vivente non accipiat." But Sir H. Spelman has given them otherwise; "De his qui conjuges suas in Adulterio deprehendunt et iidem sunt adolescentes fideles et prohibentur nubere: placuit ut in quantum possit, concilium iis detur, ne, viventibus uxoribus suis licet Adulterio, alias accipiant." This seems to exchange counsel for absolute prohibition.

At the Council of Florence, the Latin Bishops inquired of the Greek Bishops, why they allowed of re-marriage? And, although no answer was given satisfactory to them, the two churches agreed to retain their own peculiar notions, the latter having been fruitlessly counselled to correct their abuse.

By the Council of Nantz, marriage was declared to be *dissolved* by Adultery, and yet with a strange inconsistency, that has not unfrequently characterized the decrees of councils, a second marriage was not allowed.

But the Council of Trent, held in 1563, in a Canon which they drew up on this point,

and in which their sacramental notions of the marriage tie are wrought to the highest point, anathamatized all those who held that matrimony was to be dissolved by Divorce, and that it was lawful to marry again. "Matrimonii *perpetuum indissolubilemque nexum*, primus humani generis parens, divini spiritûs instinctu, pronuntiavit cum dixit, 'hoc nunc os ex ossibus meis, et caro de carne meâ: quamobrem relinquit homo patrem suum et matrem, et adhærebit uxori suæ, et erunt duo in carne unâ.'" And then the inference drawn by the Council is expressed thus; "Si quis dixerit ecclesiam errare cum docuit et docet juxta evangelicam et apostolicam doctrinam, propter Adulterium alterius conjugum matrimonii vinculum non posse dissolvi, et utrumque, vel etiam innocentem qui causam Adulterio non dedit, non posse, altero conjuge vivente aliud matrimonium contrahere: mœcharique eum qui dimissâ adulterâ, aliam duxerit, et eam quæ dimisso adultero alium nupserit: anathema sit.*

But a curious circumstance occurred respecting this, of which, Cotelerius takes no notice. We have it from Soave. The Venetian ambassadors, who were present on this oc-

* Cotelerius, Edit. Apostol. Fathers.

casion, represented, that as their Commonwealth was in possession of the Isles of Cyprus, Crete, Corcyra, Zante, and Cephalonia, which were all inhabited by *Greeks*, who had been used, for several ages, (according to the custom of the Greek Church before noticed,) to put away their wives in case of Adultery; it was hard and unjust to condemn those people in their absence, especially as they had not been called to the Council, and, therefore, they desired that the Canon should be so worded, as not to affect those persons.* For their satisfaction, therefore, and partly too upon the credit of Saint Ambrose, (whose sentiments have been previously noticed,) the case was thrown into a new shape. It no longer condemned those who affirmed this doctrine, but it only devoted to destruction all who held that the Church was wrong in teaching the contrary. Thus a sentence, which would have openly involved the whole Eastern Church in its malediction, fell in appearance only upon the Protestants, which it was the design of the Council to condemn,

* The language of the terrified remonstrants against this impending decision, is, "Li quali da antichissimo tempo costumano di ripudiar la moglie fornicaria, e pigliarne un' altra." They add too, that no Council ever told them they were wrong. Concil de Trento, lib. viii.

rather than the practices of the Greek Church.* Still it remained sufficiently plain, how decidedly adverse the sentiments of the Romish were to those of the Greek Church, and more Eastern nations. And it was in this same Council of Trent, that that "enormous bridge of doctrine" (as Croke has termed it) "was reared, which, stretching with passage broad through the intermediate ages, and with Hermas at the one end of it, and Pope Pius IV. at the other, connected the primeval error of Christianity, with a corrupt hierarchy of the sixteenth century."

Still, however, there were some remarkable exceptions to the current of doctrine in the Romish Church, in the cases of Cajetan, Catherinus, Erasmus, and even some of the Cardinals. In a comment on the nineteenth chapter of Matthew, Cajetan saith, "Intelligo ex hâc Domini Jesu Christi lege licitum esse Christiano dimittere uxorem ob fornicationem carnalem ipsius uxoris, et *posse aliam ducere*." And then he remarks his surprize at the opinions entertained by his Mother Church; "Non solum miror sed stupeo quod Christo clarè excipiente causam fornicationis, torrens doctorum non admittat illam mariti libertatem."

* Calmet Antiq. p. 217.

The Cardinal of Segutium, in his Summa Hostiensis, seems of the same opinion; he says, the judge who pronounces the sentence of Divorce, should give a written record of it, on the same principles which were noticed previously in the Bill of Jewish Divorce. "Debet judex sententiam Divortii partibus tradere in Scripturam publicam redactam, ne filiis susceptis ex secundo matrimonio, probatione deficiente, valeat præjudicium generari."*

Cardinal Navarr also says, "Matrimonium contractum cum secundâ post sententiam Divortii, *valet*. †

But the most remarkable resistance to the tenets of his own church, is made by Sanchez the Jesuit,‡ and one of the highest form; who, in an argument on this subject, confesses that, "ex ipsis Catholicis aliqui existimarunt omnium dissolvi matrimonium quoad *vinculum*, eo propter *Adulterium* alterius conjugis separato: atque ita *licere aliud matrimonium* inire, *priori conjuge superstite*." And then referring to the opinions of others, to Sixtus Senensis, adopting the sentiment of Origen, "asserentem sui temporis Episcopos permisisse alias nuptias uxoribus ob virorum Adul-

* Sum. Host. De Divort. lib. iii. n. 11.

† Navar. lib. iv. Concil. 1. n. 3.

‡ Sanch. de Matrim. Tom. iii. lib. 10. de Divort. Disp.

teriis ab ipsis divertentibus," To St. Ambrose, Tertullian, Erasmus, Cajetan, and Catharinus, he adds, that this was also the judgment of the Greek Church, the Lutherans, and the Calvinists; and even of one of the Popes, (Zacharias the First;) and, lastly, the Council of Worms, (Vermerias,) "Maritus possit uxorem dimittere, et si voluerit *aliam ducere*, refertur."

The Catholic doctrine has, however, run in another direction, although it is remarkable, that, notwithstanding these notions of the indissolubility of the contract, the Pope, who, in other cases, was found to arrogate the power of trampling on the laws of both heaven and earth, readily enough granted Divorces to such as were able to pay for them, while (as it has been acutely remarked) the *poor* suitor could not gain so much as a hearing at the chair of him, who calls himself, servant of servants.

The ancient Franks had been accustomed to put away their wives by consent, and when married persons thus agreed to part, such Divorces were considered lawful. Of course, therefore, separations for serious causes were permitted.

Marculfus, who lived about the middle of the seventh century, has prescribed several forms of letters of this kind of Divorce; and

from these, it appears, that parties might marry again whom they would.* Though the Roman laws were received in France under Charles the Great, and Lewis the Debonnaire, yet Divorce did not become more common, because the Ecclesiastical Canons of the Councils of Africa, and the Decretals of the Popes, wherein Divorce was expressly forbidden, except in case of Adultery, were followed in this particular; but the master could at any time dissolve the marriage of his slave, and this even after the ninth century.

The restraints, however, above alluded to, in regard to Divorce, were afterwards neglected, and great carelessness followed. In some parts, the ancient strictness remained, and characterized, as well the punishment of crime, as the employment of the remedy. The Burgundians never allowed the wives to forsake their husbands on any pretence whatever; and the men were not suffered to put away their wives, except for the reasons expressed in an Edict of Constantine. In a late period, Margaret of Burgundy, Queen to Lewis Hutin, King of France, was hanged for Adultery; and the ordinary execution of her gallants, not being deemed sufficient, they

* Marculfus, lib. 2. formul. 20.

were ordered to be flead alive. Perhaps this severity was, in a degree, attributable to the elevated rank of the offender.

In the Code Matrimoniale of France, there are some curious records of the ancient laws passed in various districts of that country, and of privileges granted by several of the French Kings in reference to the punishments which were to attach upon this crime.

The laws usually prescribed severe flagellations, or public exposures, (fustigatio vel currere nudus per villam,) and the privileges permitted the commutation of these for pecuniary mulcts: in some cases, these fines were heavy; in others, so inconsiderable, as to render the criminal indulgence a cheap enjoyment.

The statutes of Bragerac imposed a fine of a hundred sols;* which, in the early part of the

* "Item. Si quis committat Adulterium, in centum solidos monetæ currentis erga dominum condemnetur." Art. 86.

Privileges of Granada also, granted by Philip, 1291. confirmed by John, 1350:

"Si aliquis in Adulterio scienter commisso deprehensus fuerit, currat per villam, ut in aliis villis domini nostri regis est fieri consuetum, aut solvat domino nostro regi aut abbati vel eorum mandato, centum solidos Tholosanos, et quod voluerit optionem habeat eligendi," &c. Art. 22.

fourteenth century, would be no trifle. This, in Prissez, near Maçon, an episcopal town of Burgundy, in the province of Saone and Loire, in 1362, was made by King John; "Sexaginta solidos et unum denarium." While at Castelnaudari, in the province of Aude, in 1367, Charles V. made it "*cinque sols seule-*

Privileges of Montolien, by Philip V. and Charles V. confirmed by Charles VI. 1392:

"The commutation for the flogging. Sexaginta solidos domino regi pro emenda." Art. 31.

Privileges of Figeul, by Philip V. confirmed by Charles VI. 1394:

"Fustigentur per villam, et si pœnam prædictam redimere voluerint, in commune, ut dictum est deprehensi, liceat eisdem super hoc cum nostris gentilibus componere," &c. Art. 41.

Privileges of Montfaucon, confirmed by Charles V. 1395:

"Vir et mulier si reperti, spoliati penitus et nudati currant per villam: aut currere teneantur, aut solvant sexaginta solidos tholosanos dominis dicti loci," &c. Art. 17.

Privileges of Fleurence. Confirmed by Charles VI. 1396:

"Currat per locum, aut solvat nobis vel mandato nostro decem libra turonenses," &c. Art. 24.

Beauvoir in Dauphiné. Charles VI. 1397:

"Pro Adulterio sexaginta solidi et unus denarius," &c. Art. 10.

ment!" At Vienne, an ancient town of Dauphiné, a law of Charles V. confirmed by Charles VI. 1391, made the fine twenty-five florins to the rich, and ten to the poor.*

The public exposure, however, was of a serious kind. The terms in which these laws are couched sufficiently evince this; those, particularly, of Aigues-Mortes, in the Department of Gard, made by Philip I. A. D. 1079, and confirmed by John, in 1350; and of St. André, by Philip Le Bel in 1292; also confirmed by John, in 1362.†

The flogging also must have been severe; sometimes the parties received it while running, in opposite directions, through the village, or the town, in a state of nature, "et ab unâ portâ fustigabantur usque ad aliam." Sometimes a part of her clothing was permitted to be retained by the female, that the exposure might be less disgraceful.‡

* "Si aliqui deprehensi in Adulterio, sit in electione viri, divites tantum *viginti quinque florenos*, et pauperes, solvere *decem* florenos tantum. Vel fustigari per villam nudus cum muliere," &c. Art. 7.

† "Publicé currant nudi (coopertis pudibundis mulierum," &c. Art. 12 and 13.

‡ "Fustigetur nudus per villam cum muliere inductâ camisiâ usque ad mamillas, ne appareant naturalia."
Privil. of Vienne. Art. 7.

A distinction, however, prevailed in these ancient laws similar to one noticed in an earlier part of the Essay, between the commission of this crime by persons who were both married, and by a married person with one unmarried. The crime was not imputed to the single, but only to the married person; and the fine was exacted, or the flogging inflicted accordingly.*

Another circumstance is observable in all

* The passage before quoted from the Statutes of Bragerac continues thus:

"Si supra dictum Adulterium inveniatur seu capiatur; aut curret nudus villam unâ cum muliere adulterante; *si tamen dicta mulier habeat virum.* Et si quidem *solutus* inveniatur cum eâ stuprum committendo, *mulier de Adulterio condemnabitur et vir erit sine culpâ.* Si autem vir sit *uxoratus,* (married,) et se immisceat cum muliere *solutâ,* dictus vir de adulterio condemnabitur et mulier recedat e soluta.

"Si autem contingat prædictos virum et mulierem fore *ligatos,* (married,) eorum sit electio, aut de currendo villam nudi vel de solvendo dicto domino centum solidos, quilibet ipsorum tam adulter quam adultera." Art. 86.

Privileges of Villeneuve de Coynan in Dauphiné, by Charles VI. 1396:

"Repertus in Adulterio conjugatus cum conjugatâ solvat quilibet triginta solidos, &c. *non conjugati vero nihil solvent,*" &c.

these laws. The punishments were only inflicted when the parties were *caught in the act*. And one of the regulations of the code of Aigues-Mortes, is, that the offenders shall not be *sought for*, but only if *taken* in the perpetration of the crime are they to suffer.*

It was allowable, however, to construe this with some latitude, and the detection of the parties alone, in a place, and at an hour, that

* " De adulteriis nulla fiat inquisitio. Sed qui in ipsa turpitudine fuerunt *deprehensi*, vel concordent cum curiâ nostrâ predictâ, vel sine fustigatione publicè currant nudi; (coopertis pudibundis mulierum.") Art. 12.

Ordonnance of Charles, Regent of France, 1357, in favour of the inhabitants of Ville Franche, in Perigord, now the Department of Dordogne:

" Adulter et adultera si *deprehensi* fuerint in Adulterio, si inde factus fecerit clamor, vel per homines fide dignos super hoc convicti fuerint, vel confessi in jure, quilibet in centum solidis pro justitiâ puniatur vel nudi currant villam. Et sit optio eorundem." Art. 21.

Privileges of the City of St. André, by Philip Le Bel, 1292. Confirmed by John, 1362:

" Quod si aliquis habitator dicti loci Adulterium ibidem commiserit, curia ex officio non inquirit, *nisi ipso* per officialem curiæ *in Adulterio deprehenso:* et tunc si cum curiâ de emenda non conveniret, fustigabuntur simul nudi per villam, pudibundis tamen mulieris coopertis." Art. 13.

might reasonably be termed *suspicious*, if they had been previously admonished, would render them liable to the penalty. The penalty, in case of a repetition of this offence, sometimes was a temporary banishment, as well as whipping; and sometimes it was discretionary with the judge.*

* " Item dicimus de illis qui post prohibitionem a marito factam, vel à curiâ nostrâ prædictâ, ad requisitionem mariti, inventi fuerint soli in loco et hora juxta rationem suspectis. Si vero plusquam semel in aliquo prædictorum deprehensi fuerint, fustigentur vel per relegationem temporalem vel modo alio punientur," &c. Art. 12.

Privileges of the Burgesses of Cyrien, by the Lord of Chaudien. Confirmed by Charles VI. 1383:

" Qui in Adulterio deprehensus fuerit per castellanum aut familiares nostros in loco suspecto secreto et diffamatus fuerit de dicto Adulterio, et Adulterium et diffamatio et locus secretus rationabiliter probetur in curiâ nostrâ, conjugatus cum conjugatâ vel solutâ, vel è converso, solvet quilibet vir et mulier *pro banno*, sexaginta solidos Viennenses, et quod vir et mulier sint pro tanto quieti: etsi vir sexaginta solidos solvere voluerit ex dicto adulterio, pro tanto sit quietus et liberatus: et quod vir aut mulier non possint nec debeant compelli aut deteneri per nos, aut familiares nostros, ad solvendum prædictos sexaginta solidos, unus pro alio, &c. et si solvere non possent, aut nollent per villam currere, teneantur cursum, si maluerint, ab unâ portâ per villam usque ad aliam portam; et unus sine alio rotari non debet," &c. Art. 61.

These penalties are to be traced into later periods. Sometimes the parties were tied together to receive the merited castigation, and the fine was inflicted besides:* but this was made to depend upon their being caught *in flagrante delicto*; and if they could effect their escape they were exempt. This was the case in the ancient and populous city of Agen, in the Province of Garonne, the birth-place of the celebrated Joseph Scaliger.†

By the customs of Bayonne, in the Province of the Pyrenees; and of the Chatellerie d'Iprès, in Flanders, in 1535, the first, second, and third offences were successively visited by augmented penalties; and from fining, and running the gauntlet, they amounted to a seven

* Customs of St. Severe, in the Province of Landes, 1514:

"Homme et femme trouvés en Adultère doivent être fustigés par la dite ville, tous deux ensemble et payer au seigneur, 7 liv. 8 sol. 6 den. tournoi." Tit. iii. Art. 3.

† "L'homme ou femme pris en Adultère doivent courir la ville leurs mains lieés tous deux avec une corde, et le seigneur doit avoir 5 sols arnaudens. Comme aussi doivent être pris l'un sur l'autre tous deux dans un lit, ou qu'ils ayent *les haut-de-chausses avalez*, (their apparel in such a condition as to afford a presumptive proof,) non en autre manière; et s'ils peuvent evader avant qu'ils soient pris, ils sont quittes." Art. 15.

years, or even a perpetual, banishment. A provision was also made by the latter code, that, in case the parties were poor, (n'etoient pas solvable,) the flogging might be substituted for the fine, and the offenders might suffer in their *persons*, when they could not in their *purse*.*

The last of these customs, which shall be noticed, is that of Bearn, a ci-devant Province of France, now of the Lower Pyrenees, bordering on Spain, and which is curious, likewise, for its mixed language. It is taken from

* " Crime d'Adultère pour la premiere fois est puni a peine de courir la ville sans fustigation et de banissement arbitraire de la ville et jurisdiction." Tit. xxv. Art. 1.

" Et la seconde fois par fustigation publique et banissement perpetuelle." Ibid. Art. 2.

" S'il est trouvé que quelque homme ou femme etant mariée venut en Adultère, chacun encourroit l'amende de 60 liv. parisés pour la première fois; et quiconque seroit trouvé une autre fois vivant en Adultère, par dessus la dite peine ce seroit a peine de deux fois 60 liv. parisés; et pour la troisieme fois, ce seroit a peine de banissement de 7 ans. Quant a l'homme, ce seroit a peine de la potence, (gibbet,) et la femme a peine d'être jettée dans les puits. Et si les dites personnes n'etoient pas solvables pour la premiere fois pour payer la susdite peine, en ce cas elles seront punies, comme pour crime par le fouet, ou autrement arbitrairement à la discretion du juge." Art. 58.

their Rubric of rewards and punishments in 1551.*

But the severity of these penalties was by degrees abated, or, more properly speaking, relaxed; and, after the lapse of some time, the heinousness of the crime appeared to the mind, habituated to the view of its repetition, considerably diminished. At length, in parts of the neighbouring continent, it was scarcely punished at all.

In some Provinces, (Rochelle, for instance,) an adulteress was severed indeed from her husband, but she was liberally alimented, and allotted even to the extent of one-half of the estate purchased by her husband. But Pope Honorius III. in a Decretal Epistle, which he sent to the magistrates and inhabitants of that place, reformed that scandalous custom, as one alike repugnant to justice and reason, and which must have operated as a premium upon the crime.†

* Rubrica de penas et emendas:

" Prees en Adultery, sia mascle ó femela touts dus deben corrè la vila, et estar affuetaby per lo executo de la hauta justicia." Art. 17.

† " Apud Rupellanos jam olim invaluère nonnullæ consuetudines quorum duo capita à jure et honestate publicâ abhorrentia damnavit Hon. III. P. in Epist. Decretali ad

Considerable laxity, however, with regard to this crime, continued to prevail on the Continent, and particularly in France. The Civilian Faber, quoted by Thuanus, states, that " it was never heard that any body had been punished for Adultery in that country." It would seem, therefore, that the flagellations and the fines, recently noticed, were either rarely inflicted, or, what is more probable, that the offenders were but seldom caught. He makes the observation in consequence of a circumstance which occurred at Orleans, in the reign of Charles IX. in 1563; and which occasioned considerable emotion.

The celebrated warrior and Protestant St. Cyr, not less virtuous than valiant, was then Governor of that place, and one Deslandes, Sieur du Moulin, who had been formerly Secretary to the King, having committed Adultery with Godarde, the wife of John Godin, a Lieutenant to the Provost Marshal of Blois, the Governor, whom Thuanus describes as a

Majorem et Burgenses de Rupella: primum fuit, ———; alterum fuit, ut mulier ob Adulterium non amitteret lucrum *mediæ partis omnium bonorum per virum quæsitorum constante matrimonio.* Consuetudinem hanc emendavit pontifex, *quia proderat mulieribus adulteris.*"

Alteserra rerum Aquitanic. lib. iii. cap. 18, p. 227.

man of primitive manners and severity, caused both the offenders to be publicly executed in the square of Martroy, affirming, that the raging vices of the time required such an example to be made.*

This unusual proceeding provoked much animadversion on the principles of Protestantism, to which this conduct of St. Cyr's was attributed; and at court many were heard to declare that they would always hate that religion, if for no other reason, yet for this, that it made a capital crime of that, which, till then, had not been so much as punished. The courtiers were but too correct in saying that this virtue was out of fashion. The historian admits it to be " nova et inaudita severitas pœnam capitis pro hoc vitio statuere."

But St. Cyr was not the only one who made this attempt to resist the increase of profligacy by rigorous punishment. It is remarkable, that the father of Thuanus himself, when he was in power, had caused several persons, guilty of that crime, to be punished; and Brissonius, in dedicating his book to Monsieur de Thou, comments strongly on this circumstance. " In former days, one's ears rung with

* Both Beza and Thuanus relate this fact. Beza. Hist. Eccles. vi. p. 336 Thuan lib. xxxv. init.

this complaint of the satirical poet, 'Why sleeps the Julian law?' for ignorant minds were possessed with an opinion, that Adultery could not be punished in France, which opened a door for all sorts of debauchery and wickedness; and an universal corruption of manners being thereby introduced, this vice began to be highly esteemed and praised. But you, Sir, have put an end to this opinion, by making an example of some adulterers, and convinced us that it was not a will to punish, but accusers that were wanting to our forefathers. This public example has been greatly extolled by all good men."*

It is very probable, however, that, notwithstanding all the applauses of good men, Christopher de Thou relaxed; and, perceiving he could not singly put a stop to this corruption, was obliged to let things take their course. It may be from this cause, that his son takes no notice of this short interruption to impunity. The temporary severity soon vanished. It lasted longer at Geneva than elsewhere. Maimbourg remarks, that there is hardly any vice which oftener escapes with impunity than that; and it may be said in general, to the shame of Christians, that

* Preface to Brissonius.

they have suffered the penal laws, which many Pagan nations have made against Adultery, to be abolished time out of mind.* Not that every thing in those laws could be approved. What could be more horrid than the custom which Theodosius suppressed at Rome? But certainly greater rigour might have been admitted. Brissonius indeed says, that if accusers had been found, the Judges of France would not have been unwilling to punish. It is confessed, that accusers have been few, but the difficulty of proving such an accusation, and the odium attaching to the character of an accuser, are more than sufficient to account for this paucity, and to prevent suits of that kind.

A professor of philosophy at Groningen, published, in 1663, a collection of disputations, wherein he says, that the divines of Strasbourg prevailed, about thirty years before, with the magistrates, to inflict a capital punishment on adulterers; and he wishes the reformed divines of the Low Countries would attempt something similar. Had they (he says) thundered more against this vice, they might have procured some more heavy punishment than a

* Critique de l' Histoire de Calvinisme. Lettre ix.

fine. "Oh si fervide detonuissent in Adulterium, quod proh dolor! per totum Belgium *pecuniariâ duntaxat mulctâ expiatur!*"

From France and the Low Countries, we pass to Spain and the other countries of Europe. In the former of these, a similar mode of punishment was adopted towards the adulterer, with that which was noticed in the statements of the Roman poets. A sort of compulsory self-castration, or, sometimes, a mutilation, nearly approaching to it; though this penalty varied greatly in parts of that kingdom. The accounts of Du Cange and Spelman somewhat vary. In some places, it is stated to be merely a fine, in others, whipping.*

In Poland, the guilty person was confined in a situation which exposed him to the suffering of intense pain, and a razor was placed within his reach, giving him an opportunity of rescuing himself, by inflicting the operation of self-castration. Humanity cannot but

* "Apud *Hispanos*. Castrabantur adulteri. Cum *Arragonensis* solvebant LX Sol de Calumma." If both offenders were married, "*duplicatur*." And if not able to pay, "flagellabantur." Du Cange and Spelman, Gloss.

coincide with the observation, that this was a "*hard choice.*"*

Among the ancient Swedes and Danes, a similar privilege to that before noticed, in the Laws of Solon, and the Novels of Justinian, was granted to the injured husband, who witnessed the infidelity of his wife. He might kill her, and castrate her gallant.

So among the ancient Germans, the husband had a power of instantly inflicting punishment on his adulterous wife. He cut off her hair in the presence of her relations, drove her out of his house, and whipped her through the city. Tacitus, however, remarks, that to the credit of this people, who held the laws of matrimony in strict regard, their chaste women required no spiritual court to restrain sobriety of manners, and that Adultery was a rare crime among them.†

* "Apud Polonos in pontem Murcati is ductus per follem testiculi clavo affigitur, et novaculâ propè positâ, hic moriendi, sive de his absolvendi *dura electio* sibi datur."

† "Quanquam severa illic matrimonia, nec ullam morum partem magis laudaveris. Paucissima in tam numerosâ gente adulteria, quorum pœna presens et maritis per-

In Bohemia, Adultery was a *capital* offence.*

The laws of Lucca, in Tuscany, made it punishable by fine, and banishment for a year.

A law of Sicily, again, condemned the offender to the *flames*, even where it was proved that the crime, on his part, did not include seduction.†

Joseph Scaliger says, he was at Geneva, when a very handsome young woman was *drowned* for this offence; so that it exposed those who committed it to a *watery*, as well *as a fiery* death. In the last mentioned case, Scaliger says, the execution drew tears from the eyes *even* of the Calvinist minsters; *he* did not think they could be among the first to weep over the sinner or the sin.

missa. Accisis crinibus *nudatam* coram propinquis expellit domo maritus, ac per omnem vicum verbere agit."
Tacit de Mor. Germ. xviii. xix. xx.

* " Apud Bohemos pœnam decapitationem."

† " Si vir cum volente et acquiescente crimen commiserit, flammis ultricibus *exureretur*."

In Mexico, (which may here be just alluded to,) the adulterer was stoned to death. This severity may, perhaps, be accounted for, by reference to the extreme indulgence granted by their laws of Divorce. Nothing more was required by them, than the consent of the parties, so that they had no occasion of going before the judges, they themselves decided the matter. The partition of children was made according to their sexes; the woman had the girls, the husband the boys; but the moment a marriage was thus dissolved, the parties was forbidden, under pain of death, to cohabit again; and this was the only safeguard which the laws had placed around the liberty.

Before adverting to our own country, it may be well to notice the customs of the East. There, indeed, the crime under consideration was lamentably familiar, and has ever been so. Much may be referred to the influence of climate, and mode of life, in observations on the loose habits of the Orientals; but, from the frequency of this crime among them, they might well be termed, "*an adulterous generation.*"

In Ceylon, Adultery is so common, that there

is scarcely a native woman but practises it. So, at least, the writers on that island describe a fact, of which, in spite of observation, charity to the human species desires to be incredulous. The crime is *punishable* by death, but the execution is, perhaps, less rigorous than the threat.

The Arabians, according to Strabo, though they used incestuous copulation with sister and mother, yet punished Adultery with death; but then, Adultery was limited by them to the act of another, beyond the lineage of the family. The Koran enjoined, that if a wife were convicted of this crime, by the testimony of four women, she should be confined to perpetual imprisonment in her house, till she died.* The process of examination was somewhat curious, in the case of the husband being the accuser. The man swears five times, that his allegation is true; and to the last oath, adds an imprecation, wishing he may be cursed by God if he lies. On the other side, if the woman swears as often, and adds to the last oath a prayer, desiring God to destroy her if her asseverations are not true, she is usually believed. If the fact is proved against

* Geog. Tom. ii. p. 1180.

her, the husband has her life in his power, and, if revengeful, may put her into a sack full of stones, and drown her.* The adulterer is condemned to ride on an ass, with his face towards the tail, which he holds as a bridle, his head crowned with the entrails of a beast, and his feet afterwards bastinadoed.

Among the Tartars, Adultery is but seldom heard of, but when it happens, it is punished by death. It is so, likewise, by the laws of Jenghis Khan, the founder of the Mogul Empire.

In Japan, the jealous husband may take away his wife's life, if she proves unfaithful to his bed, and violates her honour. If she is detected in familiar conversation with another man, it is looked upon as so criminal, as to be worthy of death; not banishment, not confinement, is deemed sufficient penalty, nothing less than the loss of life, and this is so strictly enforced, that instances have been known of suicide, committed by the females of Japan after acts of this kind, to prevent the

* This is the same as the "insuère culleo vivos," of Constans, noticed in p. 141.

possibility of discovery; but both sexes are not placed on the same footing.

In some part of Continental India, the unlawful indulgence, of which we speak, is permitted to any woman for the price of an elephant; while in the dominions of the Emperor Akber, it was punishable in a Brahmin by banishment, but in any other person by death, though no penalty was inflicted on the woman. Indeed, strange contrarieties prevail in respect of the penal inflictions which follow Adultery in the East. In some parts a fine is levied on the adulterer, varying from two hundred to five hundred dams, with the excision of the woman's ears and nose. In Ethiopia, also, it occasions the loss of the adulterer's nose.

In the Marian Islands the woman is not punished for the crime. Among the Japanese and others, it is only punishable in her. In Abyssinia, the crime of the husband is said to be visited on the innocent wife, while in the islands just mentioned, *she* is exempt when guilty, and *he* is severely punished. His wife and relations eject him from his home, and waste his lands.

These are anomalies in legislation that it is quite impossible to comprehend.

Punishments, nearly of the same nature with those before alluded to in Egypt, and perhaps nearly about the same time, were instituted in the East Indies against adulterers; originating with the Hindoos, perhaps less, as in the case of the Egyptians, in a regard for the women, than in a spirit of jealousy and revenge. The Shaster is every where replete with nice discriminations of comparative guilt, and has been so, likewise, in reference to the matrimonial crime; and the penalties have of course varied in consequence of these discriminations. If committed with a woman of superior caste, the adulterer is put to death; if of inferior caste, and by force, his possessions are confiscated, the mutilation before noticed is inflicted, and he is carried round the city on an ass. But if of inferior, or equal caste, by fraud, he is to forfeit his estates, be branded on the forehead, and banished the kingdom.

These laws of the Shaster except the Brahmins, and apply to the upper castes; but if any one of the lowest caste commit Adultery with a woman of a far superior order, he suffers not only dismembration, but is tied on a hot iron plate, and burnt to death, while the inequality of crime is regarded as so great that the highest caste may commit Adultery with

the lowest for the most trifling fine. A Brahmin only suffers the loss of his hair, and like the clergy of England under papal protection, cannot be put to death for any crime whatever. But to the wife of the Brahmin the laws are not so lenient; a severe disgrace is inflicted upon her if her crime be committed with the higher caste; and if with the lower, it is followed by the loss of her hair, a nauseous unction, and procession through the city on an ass, and then an ejection from it on the north side; or, as some writers affirm, she is delivered to be devoured by the dogs. These several punishments have justly been observed to be directed less by the moral turpitude of the crime than by the dignity of the several castes, and by that revenge which so naturally results from jealousy, in a climate where animal love is the predominant passion.

In China, Adultery is stated by some writers not to be a capital crime. Others, again, affirm that it is so regarded both at Java and in China; and that, at the capital city, Pekin, the dowries, or jointures, of convicted adulteresses, are bestowed on the hospitals and female orphans; and at Petane, a province adjoining to China, the more noble

criminals have the option of either the bowstring or the poignard, as the mode of punishment which awaits their guilt. In some parts of the empire this phlegmatic people sell an adulteress for a slave.

It is said that a similar practice of borrowing and lending wives prevails in China as it did once in Sparta; and that fond parents will even make a stipulation with their daughters' husbands to allow them the indulgence of a gallant; but, by the more refined, this custom is held in the abhorrence it deserves.

Sir John Chardin, in his Travels, notices the view which the Mingrelians took of this subject. "Adultery," he says, "is punished with the forfeiture of a hog, which is usually eaten in good friendship between the gallant, the adulteress, and the cuckold."

If the practices in the East were anomalies in legislation, these are certainly equally so in morals. But such lax notions are not to be wondered at, when he further tells us, that "as to their education, it is the most obscure imaginable, and their notion of marriage nothing but a contract of bargain and sale."*

An equal laxity prevails generally among

* Travels, first part, page 85.

the nations last alluded to, on the subject of Divorce; and this had better be disposed of before we remark on the enactments and customs of Great Britain.

In Mingrelia, their law of Divorce is very wide. "If any one," says Chardin, "have married a *barren* woman, or of an *ill disposition*, or *ugly humour*, they hold it not only lawful, but *requisite* to divorce her, inasmuch as it was no contract, no match, of God's making!"*

The Ethiopians allowed of great liberty in Divorce. It was very common among them, till the Missionaries taught them better.

The Mahometans have equally loose notions on the subject of Divorce. Their religion holds it to be lawful, whatever the occasion be; and it is sufficient if one party dislikes another, and that they resolve to unmarry themselves. The act of separation is usually past before a judge or a churchman, and called *Talaac*, or a Bill of Divorce.†

* Travels, first part, page 102.

† Pitt's Account of the Mahometans, page 334. He witnessed many Divorces and consequent re-marriages.

This leaves the parties at liberty to marry again. On this dissolution of marriage the man is obliged to return to the woman her dowry, if it be *he* that sues out the Divorce; if not, she loses it. A liberty of renewal of the marriage is also granted; and this dissolution and renewal are tolerated three times, but not more.* But this is sufficient to show, that the charge of a wife, with them, is little more than the charge of a maid-servant.

This privilege, in Persia, is rarely made use of; but the abuses it holds out are sufficiently obvious. True, the husband must return the portion if *he* sue out the Divorce; but it does not require much ingenuity to perceive that he could easily adopt such a treatment of his wife as would compel *her* to that measure; in which case he retained it; and the secrecy with which the conjugal intercourse is carried on in those countries, would be a complete bar to all inquiry.

In China, Le Comte states, that no Divorce to the husband is allowed but for Adultery, and a few other causes, which, he says, rarely

* This separation among the Persians must be in the presence of the Casi, or Cheit Lesloon, (Doctor of Law.) Tavernier Trav. book 5. cap. 18. p. 243.

occur. In those cases the husbands sell their wives to any one who will become a purchaser, and buy others.

The infrequency of their Divorces is perhaps to be traced to the permission of concubinage, particularly when among the causes of Divorce tolerated by them is found enumerated one which, in christian countries, would not be heard of; viz. the *irksomeness of the married state.* The account of Le Comte does not seem easily reconcileable with this last statement; but the former is speaking of the provisions of the law, while the latter has reference to the habits of the people.

It is certain that the great Chinese Lawgiver, Confucius, put away his wife on this ground. In his "Life," it is stated, that he was content with her as long as they were together; that he never kept any concubines as the custom of his country allowed, because he thought it contrary to the law of nature; but that, after a time, he divorced his wife for no other reason than that he might be free from all incumbrances and connexions, and be at liberty to propagate his philosophy throughout the empire.*

* Life of Confucius, p. 28.
Edit. printed at Stationers' Hall, 1691.

Some of the Catholic Missionaries have remarked, that one of the chief obstacles to the introduction of Christianity among the Chinese, was the system of unrestrained intercourse of this kind which prevailed among them; and Le Comte relates two remarkable instances, where concubinage was the sole bar to a reception of the gospel; but this could not be relinquished: as in the case of the young man in the gospel, the instructor was left with sorrow for the harshness of his requirements.

A law of the Algerines, mentioned by Dr. Shaw, is not a little extraordinary. A forfeiture of the *Saddock*, or wife's marriage portion, entitled the husband to put away his wife whenever he pleased. There was but one circumstance, (and that was still more extraordinary,) which at all tended to qualify and restrain the rash and arbitrary use of such a tenancy at will of the wife vested in the husband. It was this; that, when so put away, he could not take her again, notwithstanding the strongest solicitations were made in her favour, till she had been married and bedded to another man.*

* Shaw's Travels, fol. p. 303.

The laws and customs of other parts of the world have generally been characterized by less rigour than those of the European kingdoms, although in the latter great fluctuations are observable. It is time we should return to cite a few instances from among *them*, and conclude this fourth section of the Essay, by adding afterwards a few observations on the ancient laws of England.

We have before dwelt much on the attempts of the civil law to discourage the frequency of Divorce, although they were often obliged to yield to the licentiousness of prevailing customs. The practice of the Modern Greek Church is exactly conformable to that law in this respect. Divorces were tolerated, though contrary to the laws; but afterwards greater remissness was introduced, and unlimited liberty allowed. The Patriarch, for a trifling gratuity, would disannul one marriage, and grant a dispensation for a second.

Among such nations as adhere to the Greek Church the same custom prevails.

The Muscovites, or Russians, divorced for slight causes; and sometimes the Bishop gave them the Bill of Divorcement. It was usual in such places as were remote from the Bishop, for the man and woman who were desirous of parting, to go to a place where

two ways met, and then to pull a napkin between them till they tore it asunder, by which means they fancied their marriage dissolved. Yet, neither among them, nor in the Greek church, generally, was re-marriage allowed in early times. Afterwards, it was not prohibited. Among the canons of one John, a Metropolitan of that church, was a decree by which those who marry after Divorce were to be suspended from communion.

The Visigoths* of Spain had strict laws

* "Rex Wisigothorum Theodosius edicti, cap. 54. causas justas repudii habet. Si maritus homicida, maleficus, aut sepulchrorum sit violator. Si mulier *adultera*, malifica vel agagula;" (agagula est lena.)

Great care is evinced by some of the old laws, of what are termed the barbarous nations, for the protection of the chastity of women. In the warm climates of Spain and and Italy, less injuries have been made penal. By a Neapolitan Ordinance in 1571, this is carried further, and it is made a capital crime in those "che per forza *baciassero* le donne," &c. In a similar spirit of jealous vigilance the ecclesiastical laws of Hoel-Dha, King of Wales, A. D. 940, held, that it was a sufficient cause of Divorce, if a woman did but *kiss* any other man than her husband. Her dower and all her rights were forfeited by a kiss; meaning, probably, that such conduct indicated a disposition to commit this crime. Leges Wallicæ, p. 78—80, and 258.

about Divorce. Those of King Euricus expressly forbid it, save for Adultery. In Italy, those of King Theodoric ratified among the Ostrogoths the old Saxon law, which was the same as Constantine's, mentioned in a former part of the Essay. The Ancient Germans, and the nations descended from them, allowed of Divorce, *if the wives had been taken without any marriage solemnity;* the mode of executing which power was by declaring before seven witnesses, (advocates,) and five other persons, that they did not do it for any vice or failing in *them*, but because they liked some other better. These laws bear date in the sixth century, and consequently before those nations had embraced Christianity; but if the marriage ceremonies had been of a more formal nature, nothing but the death of one of the parties, or the infidelity of the wife to the marriage bed, could dissolve it; and, after they embraced the Christian Religion, they were still further confirmed in these sentiments of the sacredness of the marriage tie. Voluntary separations, however, became frequent among them, and monkish vows of chastity contributed to this abuse.

Of the Gallican Church we have already, in part, spoken. The Council of Elvira refused the communion, even at the hour of

death, to the woman, who, without lawful cause, forsook her husband, and married another. By another regulation of that same Council, Adultery was considered such a cause; she might forsake in that case, but not marry again, and she would be debarred the communion till after the death of her first husband. In those days of superstition this was a serious restraint.

In the seventeenth century we have an account of a Divorce obtained by one Polycarp Sengebera, a learned civilian, against his wife, by reason of her Adultery. The celebrated Giles Menage (the Varro of that time) was the plaintiff's advocate. The proofs of the crime were decisive, but the penalty they regarded as inconsiderable: the offending wife was "*merely*," say they, "placed in a nunnery for solitary confinement." So slight this, that we may well cry out, as in Juvenal's time, "Ubi nunc lex Julia dormis?"* What is become of the Roman laws, of the laws of Augustus, of Constantine, of Justinian?" It would have been well had no greater leniency ever afterwards marked the character of the people, and made that nation so famed for gallantry.

* Juv. Sat. ii. v. 37.

We must pass now to the consideration of the subject in reference to the British Isles. It is not very useful, but it may be interesting, and is necessary to render this part of our subject complete, to inquire what our native savages thought of these matters.

The Anglo-Saxons afford some glimmering of legislation concerning them. They are said, in their own country, to have *burnt* the adulteress, and over her ashes erected a gibbet whereon the adulterer was hanged. And a kindred severity was imported by them into Ancient Britain.*

The laws of Withred, King of Kent, and which were made at the Council held at Berghamstead by Bertwald, Archbishop of

The following passage is very painful. It appears in an epistle to Æthelbald, King of Mercia, from Boniface, Archbishop of Mentz, in the year 745, when he was the Pope's Legate in Germany. "In Antiquâ Saxoniâ (i. e. Germaniâ) ubi nulla est Christi cognitio, si mulier maritata pacto fœdere matrimonii Adulterium perpetravit aliquo, cogunt eam propriâ manu per laqueum suspensam vitam finire, et super bustum illius incensæ et concrematæ corruptorem ejus suspendent: aliquo congregato fœmineo exercitu, flagellatam eam mulieres per pagos circumquâque ducunt, virgis cadentes et pungentes punctis vulneribus cruentatam et laceratam de villâ ad villam mittunt; et occurrunt semper novæ flagellatrices zelo pudicitiâ adductæ usquequo eam aut mortuam aut vix vivam derelinquunt."

Canterbury, the Bishop of Hereford, and others, in 697, inflicted various pecuniary mulcts, besides excommunication, on such as should be found guilty of this crime. These mulcts were levied according to the condition in life of the offenders. If the offender was a military man, (gesith-cund-man,) it was enacted, that he should pay to his lord, a fine of one hundred shillings; a countryman or villager, (ceorles-man, or paganus,) fifty shillings; "besides that he shall *do penance for his sin.*" If the adulterer were an alien, he was to depart the country, and take his sins and estate away with him; if a priest, he was to be inhibited from administering the sacrament of baptism. These excommunications indicate the commencement of that cognizance, which was afterwards taken of this crime, as an ecclesiastical offence, and thus early we discover the interposition of the church.

By the laws of Ethelbert, the adulterer paid a fine to the husband, and *bought another wife for him.* This shows, though somewhat equivocally, the value at that time set upon the female sex.

King Edgar enacted, that an adulterer, of either sex, should, for the space of seven years, live three days in every week upon bread and water; but the mode in which

the execution of this punishment was to be compelled, we do not learn.

King Edmund, (A. D. 944.) whose laws respecting marriage were as wholesome in some respects, as they were curious in others, ordered Adultery to be punished in the same manner as homicide.* ("Legibus Edmundi regis apud Brompton Adulterium sicut homicidium punitur.") And both the murderer and the adulterer were denied christian burial.

Alfred's laws increased the fine which had been settled by Withred, though it was still to be a kind of *ad valorem* mulct, according to the rank and quality, estate and circumstances, of the person injured by the crime, and those of the offender. This fine, sometimes one-tenth of the offender's property, sometimes more, was known by the expressive name of *Lairwite*, or *Lecherwite*, and *Legergeldum*, from two Saxon words, signifying *concumbere*, and *mulcta*; a privilege, which is said to have anciently belonged to the lords of some manors, over their villeins or tenants. The law itself was called a Talioes law. It is somewhat strange, that Alfred should not have visited this offence with personal severity,

* Reg. Edm. lege suâ, cap. 4.
" Affici jussit instar homicidii."

especially when we find, that he added several laws, which bore heavily upon offences, even threatened, though not committed, against chastity, and " any kinde of wantonnesse."

King Canute, (or Knute,) the Dane, A. D. 1032, ordered the man to be banished, and the woman to have her nose and ears cut off.* By a subsequent regulation, perhaps, on the discovery that this would not answer the purpose, he decreed, that such as broke their conjugal vows should be condemned to perpetual celibacy. There is this, also, worthy of notice in his enactment, that, besides the indelible blot that would attach to the individuals, the estate, both real and personal, of the offending wife, became confiscated to the injured husband, and in the case of the man, he continued the punishment *capitis æstimatione* noticed in Alfred's time.

William the Conqueror made a law, that whosoever forced a woman, should suffer demembration, and lose the offending part; but this emasculation appears to have applied to all cases of violation generally, rather than to have been limited to that of Adultery.

* " Hominem Adulterium in exilium relegari jussit, fœminam nasum et aures prœcidi."

Certainly there was something more appropriate than seemly in these mutilations. Bracton says, it was reasonable that the offender should suffer, "in eo membro quo deliquet."

From the Domesday Book, however, it would seem, that the practice of mulcting the offender still continued;* for the levying of these fines is frequently mentioned, and the sums poured into the public treasury in this manner, appear to have been considerable; but it was an impure produce; and shortly afterwards, the distinction which has ever since existed (at least, with but slight interruption) between the temporal and the spiritual courts, occasioned the transfer of the cognizance of this offence, to the latter jurisdiction; the punishment was, thereupon, changed to *corporal penance*. This was in

* Bacon, in his Treatise on Government, p. 88, states, "that by the law of William, a man who committed Adultery with a married woman, should forfeit to his lord, *the price of his life.*" Ll. Gulielm. cap. 14. 19. 371.

This expression seems somewhat equivocal, and appears to imply, that Adultery was *capital*. But Bâcon has evidently not understood it in this manner, by classing this punishment among the *fines* of this reign.

the reign of Henry I. confirmed afterwards by Edward I. and when, subsequently, it was commuted for money again, a provision of Edward II. declared, that in every instance of such commutation, the King's prohibition should lie.* This was, perhaps, with the hope of repressing personal licentiousness, by the more characteristic punishment of personal exposure and disgrace.

Perhaps, however, it might be traced to the commuted penalty. William the Conqueror had first altered the jurisdiction, and taken it from the Bishops. Their jurisdiction, in these matters, was derived from Rome. Bacon calls it, " a garland, which Austin brought over with him, and crowned the Saxon Clergy therewith." Offenders, on this alteration, were tried in a Leet, which was a temporal court, and on conviction, were fined, and the distribution of these fines occasioned the squabble. Sometimes they were payable to the king, sometimes to the church. It was the same in a provision of the Code Matrimoniale of France, (aut solvat domino nostro Regi, aut Abbati:) and Ayliffe shrewdly remarks, that as long as the offence was capital or punishable in the person, the infliction

* 13. Ed. I. Stat. de circumspecte agatis.

was made in quiet, and that the struggle for jurisdiction, between the spiritual and temporal powers, did not commence till commutation came into play.

In reverting, however, to the laws of William the Conqueror, one case appears to have been in contemplation, whether from any recent occurrence of the crime under such aggravating circumstances does not appear, in which it was permitted to a father, discovering his child in the commission of this crime, to kill the adulterer ;* but this permission appears limited to such discovery when made in his own house, or in that of a relation. In a later period, this indulgence was revoked, and allowed only to the husband detecting his wife in the commission of the crime. It was on occasion of one John Britton, in the reign of Henry III. who had punished one Jeffery Miller, of Norfolk, in this way, for debauching his married daughter. But the man was banished, and a proclamation was issued, that no one should presume to do the like unless it was in the case of his

* " Si pater deprehenderit filiam in Adulterio in domo suâ, seu in domo generi sui, bene licebit ei oure (lege forsan occire pro occidere) adulterum."

Seldeni ad Œadmerum notæ et specilegium, p. 185. l. 37.

wife. If he killed her, he would only be guilty of manslaughter, and that of the lowest kind; for which, burning in the hand was the punishment.

Selden, in commenting on the ancient English punishments, speaks of that attached to Adultery, as being a personal mutilation. "Certè apud Anglos jus ejusmodi mœchum deprehensum mutilandi maritale olim viguisse videtur." And he notices, in the year 1200, some curious letters from King John to the Earl of Southampton, in which he directs the Earl to make some inquiries into the case of some parties said to have been guilty of this offence; and, if found to be guilty, the punishment he mentions is the personal mutilation before referred to. The passage is so curious that it is subjoined.*

* "Præcipimus tibi quod diligenter inquiri facias per legatos homines de visâ. Si Robertus Pincerna habens suspectam Will. Wake qui cum uxore suâ Adulterium commiserit, prohibuit ei ingressum domûs suæ, et si idem Will post prohibitionem illam domum ipsius Roberti ingressus Adulterium predictum commisit, inde prefatus Robertus *mentulæ eum privabit*," &c.

This is sufficient to save John from the imputation, so quaintly cast upon him, in common with Stephen, by Matthew Paris in a passage in his History, which displays as much fondness for antithesis, as zeal against this

It was a question before the act, which made malicious maiming felony, whether the excision just mentioned was felony or not; but a case is stated, (Instit. iii. 118.) of one Henry Hall thus taking the law into his own hands, and punishing, in this exemplary manner, a Monk whom he caught with his wife, who was only indicted for a maihem.

Henry I. had punished Adultery with the loss "*oculorum genitaliumque*." Some of these barbarities (exoculation, and the excision of the ears) found their way into later periods; a cruelty this, remarks one, "which was so much the more intolerable, inasmuch as the poor tortured creature could neither be eye nor ear witness of the truth of his own wrong." Bacon says, Henry also made it inquirable at common law, as an offence "contra pacem domini;" but after-

crime. "What course was holden in the time of King Stephen and King John, is, to me, unknown; nor is it much to be regarded, seeing the latter *did he cared not what;* and the former, to gain the good-will of the clergy, *regarded not what he did.*" He thinks, however, that the punishment could not have continued of a *personal* character, it being so contrary to common sense, to give the *bodies* of *freemen* to the will of the clergy, to whom they would not submit their *freeholds.* Fol. 201.

wards it became finable to the King, and inquirable among the pleas of the Crown.

" The statute of Edward I. which is written in the Old Law French, had some singular provisions in relation to this subject. " Purvue est, qui si homme ravise femme, *espouse*, damoiselle, ou autre femme, &c. il ait *jugement de vie et membre.*" These are Edward's laws of rape. More particular reference is then made to the crime of Adultery.

It is somewhat curious, that the language of this statute suddenly changes from the French to the Latin; probably, because the subject of it related to the clergy, this matter now being of ecclesiastical cognizance. Another reason has been alleged by Bacon: " So far thereof as concerneth death was written in French, being the most known language to the great men, many of whom were French, by reason of the intercourse that Henry III. had with France in his late wars against the Barons. It was therefore published, by way of caveat, that no person that understood French might plead ignorance of the law that concerned their lives." It inflicts a *loss of dower* on the adulteress. " Si uxor sponte reliquerit virum suum, et abierit et moretur cum adultero suo, amittat in perpetuam actionem petendi dotem suam, nisi vir suus,

sponte et absque coercione ecclesiasticâ, eam reconciliebet et secum cohabitare permittat." One object of this measure was stated to be the more effectually securing the conviction of the offender. Before, the proof of this crime was often deficient from the private prudence of the woman labouring to conceal that which could not be made whole by revealing; and this law was to restrain the after-connivance of the woman by depriving her of her jointure and inheritance, which otherwise had been saved to her by such compliance, as after consent unto such violations.*

Still this was an astonishing mitigation of the punishment of this crime, when contrasted with the former legislative enactments of Edward's predecessors.

It is painful to observe, in the laws of ancient England, a departure from the simple and equitable principle of the Saviour, particularly noticed in the third section of the Essay, which marks an identity of interests and obligations on both sexes in this matter.

The Statute of Westminster; 2. cap. 34, by express words, declares, that the elopement of the wife with an adulterer forfeits her dower, but no Act inflicts on the husband for *his*

* 6 Rich. 2. c. 6. 5 Edw. 4. fol. 58.

Adultery, the forfeiture of his tenancy by curtesy.

The Adultery of the wife is a bar to her claim of dower.* " Le mari qui a convaincu sa femme adultère gagne sa dot." † The *reconciliation* of the husband will indeed restore this right, but this only; there is no plea admitted of recrimination against him. By the old canon law it was otherwise; a reciprocity of crime was a good and available plea; but here the two parties were not placed on the same footing. The husband's Adultery and desertion of his wife does not work a forfeiture of his tenancy, but the wife's does of her dower, and, by the custom of London, of her widow's chamber.‡

There is a case in the second Institute of one John de Camois, whose wife Margaret, living in Adultery with one Sir William Pannel, lost her dower.

The old writers are obliged to have recourse to the basis of expediency to explain and justify this distinction; and Lord Chancellor Talbot, in one of his decisions, noticing this difference, observes, the

* 1 Inst. 1 Roll Ab. 680. † Dict. de Droit. Civil.

‡ Lovelas. 106.

reason of it may be, that the consequence of such a crime in the wife is worse to the family than in the husband, and more likely to confuse the inheritance; although the moral guilt is exactly the same.

On the subject of this inequality of punishment in the two sexes, we may remark, that the injustice of such a distinction appeared afterwards to be felt, and in the projected *Reformatio Legum*, a nearer approach was attempted towards equalizing the penalty. The case of the women was thus stated: "Dotibus carebunt et omnibus emolumentis quæ vel ullo regni nostri jure, vel consuetudine, vel pacto, vel promisso potierit, ut bonæ maritorum ad illos descendere; tum etiam vel in sempiternum exilium ejicientur vel perpetuæ carceris mandabuntur." The case of the man was thus: "Uxori suæ dotem restitutio: bonorum universorum dimidiam partem eidem uxori concedito: præterea vel in perpetuum exilium ito, vel æternæ carceris mancipatur." This was as nearly parallel as possible.

By Henry VII. the clergy, if found guilty of offences of this kind, were punished by imprisonment and bonds. And after the Reformation, in the 12th, 16th, and 27th years of Queen Elizabeth's reign, we read of three

instances of clergymen deprived of their benefices in consequence of Adultery.*

But Adultery was never considered as a capital offence in this country, after the time of the Conquest, either by common or statute law, except in the time of the Commonwealth and Protectorate. It was regarded, and indeed it is still, as a civil injury, for which a compensation or damages could be obtained at common law, and an offence of ecclesiastical cognizance, for which a suitable remedy was provided by the Canons of the Church: but by an ordinance of Cromwell, in 1650, "Veneri, martique timenda;" it was made felony, without benefit of Clergy, to commit either Adultery or fornication, and this both in man and woman. The first offence was punished with three months' imprisonment, and the second with death.

* This deprivation in the Romish Church was often associated with a pretty severe penance. In a clergyman, it was for ten years; in a layman, only seven; *but it might be commuted for money.* The Apostolical Canons had enjoined deposition, but Pope Sylvester dispensed even with this for a fine. The gradations of this penance, between sackcloth, incarceration, lying on the ground, bread and water, hard eggs, &c. are singularly stated by Ayliffe, in his Parergon, pp. 47 and 136.

Blackstone accounts for this enactment, on principles not very creditable to Cromwell. "The then ruling power," he states, "found its interest in affecting extraordinary strictness and moral purity, but the licentiousness of the succeeding reign, unable to endure the rigidness of these enactments, soon repealed them." The acute Daines Barrington observes, these statutes could not have continued long unrepealed, even if Charles the Second had not succeeded to the throne.

But this period is as late, perhaps later, than the terms of the Thesis require the considerations of the crime of Adultery to be brought; and on the whole then, with respect to the punishment of this offence, by the laws of England, it may be in general remarked, that it is at present characterized by too much lenity. Regarded under a two-fold aspect, it is treated accordingly by the respective jurisdictions. The temporal courts notice it only as a private inquiry, and inflict a mulct, or compensation. The spiritual courts, which examine its most criminal complexion, themselves possess but a feeble coercion. Their estimate is formed by the rules of the canon law, and these have manifested an indulgence towards it, which is

chiefly to be accounted for by reference to the constrained celibacy of its early compilers.

It remains, that we notice the ancient state of the laws of Britain in respect of *Divorce*.

Selden is of opinion, that those parts of Great Britain, which were subject to the Romans, and complied with their laws, retained Divorce even after their conversion to Christianity. This he proves, by reference to the laws of King Howel-dha, whereby a man was allowed to put away his wife, if she conversed too familiarly with another man; and to marry again afterwards. But from the letters of Pope Gregory to Austin, (the apostle of Britain, and also from the laws of the kings of the Anglo-Saxons, he thinks, that the discipline and decrees of the Church of Rome upon this point, were then received in England, where they have been observed ever since.

In the first year of Lotharius, King of Kent, (A. D. 683,) it was decreed in Concilio Herudfordiæ, that the permission of Divorce for Adultery, being given by Christ, might be received, but that no dissolution of the marriage took place; indeed, he, it appears,

would have scarcely been thought a Christian, who, when separated from his wife, could presume to marry another.

"Nullus conjugem impropriam nisi (ut sanctum Evangelium docet) fornicationis causâ, relinquet; quod si quisquam propriam expulerit conjugam, legitimo sibi matrimonio conjunctam, si Christianus esse recte voluerit, nulli alteri copuletur; sed ita remaneat, aut propriæ reconcilietur conjugi." *

In 1199, King John, being divorced from the Duke of Gloucester's daughter, was, in the same year, re-married to Isabel, the heiress of a noble family. And, indeed, King John's first wife had been, previously to her marriage with him, divorced from Henry de Leon, Duke of Saxony.

Matthew Paris makes mention of the case of Simon de Montford, in Henry the Third's time, in which the Pope, in opposition to the laws and canons of the Church, granted a dispensation, and then ratified his second marriage.†

Of course, the same distinction which we have before noticed, in the two-fold nature of Divorce, obtained likewise in England: the

* Spelm. Concil. Herudford. Art. 10.

† Matth. Paris. Hist. p. 455.

one a separation à *mensâ et thoro* merely, the other, a dissolution of the marriage *vinculum*; and this latter was, by many in the reformed Church of England, held to open to the parties the liberty of re-marriage.

By the Canons of 1597, great caution is recommended to the courts, in pronouncing sentences of separation, and after such sentences, (to the case of mere separation, not Divorce *a vinculo*, we allude,) bond was taken of the parties not to marry again.

" Prohibitio fiat ut à partibus ab invicem segregatis caste vivatur nec ad alias nuptias alterutro vivente convoletur: denique sententia non pronunciabitur anteaquam qui eam postulaverint, cautionem fide jussoriam sufficientem interposuerint, se contra prohibitionem nihil commissuros."*

It was otherwise in the case of a dissolution of marriage; and this it was that occasioned a great division of sentiment with the Church of Rome, and had called for the statute of Henry VIII. which enacted, that no appeal should be made to Rome in matters of Divorce. With his own Divorce from Catherine, his brother's relict, the Essay has no connexion,

* Sparrow Coll. Anc. Stat. p. 251.

These cautions also found their way into the Canons of 1603.

as its occasion was affinity, and not Adultery.

By the 105th of the Canons of 1603,* and in conformity with the earlier decrees of the Church, no Divorce was allowed to be founded on the mere confession of the parties;† many instances of this had occurred before that period, and great corruption had been introduced in consequence: strong proofs were required to support the sentence.

With the sentences of nullity of marriage, where the contract was pronounced invalid, by reason of such causes as impuberty, (marrying *infra nubiles annos*,) or reasons which preceded the contract, this Essay has nothing to do.

The Divorces pronounced for Adultery, at

* Sparrow, Coll. Anc. Stat. p. 317.

† "Propter confessionem tantum vel rumorem vicinæ, separari non debet: cum et quandoque nonnulli inter se contra matrimonium velint colludere, et ad confessionem incestûs facile prosilirent, si suo judicio crederent per judicium Ecclesiæ concurrendum. Rumor autem vicinæ non adeo est judicandus validus, quod, nisi rationabiles et fide dignæ probationes accedant, possit bene contractum matrimonium irritari." Decretal Epist. Pope Celestine III.

"Nec partium confessioni, quæ in his causis sæpe fallax est, temere confidatur." Sparr. Coll. Stat. p. 251.

the period of the Reformation, enabled the party to marry again.

Holland, Friesland, and other Protestant countries concurred in this, by allowing it to one party, the innocent one; but this showed that they regarded the marriage as dissolved, and some of the ablest of the reformers assented to this, Luther, Melancthon, Amesius, and others.*

It was thus the Church of England thought in Elizabeth's time; but in the Star Chamber, a case occurred, where that opinion was changed; and Archbishop Bancroft, by the advice of the divines, held, that Adultery was only a cause of Divorce, *à mensâ et thoro*.

It was the case of Foliambe, divorced from his wife by reason of her incontinency. He married again. The second marriage was declared null and void.† This, they argued, was the doctrine of the common law. "Nec illi nubere conceditur vivo viro à quo recessit, neque huic alteram ducere viva uxore quam dimisit." That decree of the Church, in the Council of Hertford, which has been

* Luther de Div. Melancth. in Matt. v. Ames. de Cas. Cons. v. 38.

† 3 Salk, 138.

quoted from Spelman, appeared to reason in the same way: "Si quisquam propriam expulerit conjugem, si Christianus esse voluerit, nulli alteri copuletur, sed ita permaneat." And the Canons of Archbishop Egbert; "Ita maneant, aut sibimet reconcilientur."* But the answer to this would suggest that these separations were for other causes, and less than Adultery. *That* cause is specially excepted in the gospels, and also specially permitted in the *Reformatio Legum*, and there re-marriage is open to the injured party, and only withheld in cases where guilt shall appear to attach equally to both.

The passages are; "Cum alter conjux Adulterii damnatus est, *alteri licebit innocenti novum ad matrimonium* (si volet) *progredi*. Nec enim adeo debet integra persona crimine alieno punire, celibatus ut invitus possit obtrudi; quâpropter integra persona *non habebitur adultera, si novo se matrimonii revinxerit*, quoniam ipse causam Adulterii Christus excepit:" and again; "Si persona quæ fuerit Adulterii convicta, crimen in altero conjuge possit idem ostendere et ostenderit, *priusquam conjux ad novas nuptias diverterit*, utriusque conjux culpa par in pares inci-

* 1 Cor. vii. 7.

det pœnas, et prius inter illos firmum manebit matrimonium."

On this construction of reciprocal offences we shall say a word afterwards. Meantime we may remark, that the interpretation put upon the words of Christ appears the most natural, that the Adultery of the one party does so violate the matrimonial engagement as to leave the other at liberty, *ad alteras nuptias volare.* Indeed the *Reformatio Legum* contains a passage expressive of astonishment at the ingenuity which could for such a crime as this separate the parties from all the intercourse and duties of marriage, while at the same time the bond itself remained in force; "salvo tamen inter illos reliqui matrimonii jure. Quæ constitutio, cum à sacris literis aliena sit, et maximam perversitatem habeat, authoritate nostrâ totum aboleri placet."

We must here notice the celebrated case of the Marquis and Marchioness of Northampton. This happened soon after the Reformation.

The Marchioness had been convicted of Adultery in the reign of Henry VIII. and the Marquis was thereupon divorced from her in the beginning of the reign of Edward VI. A commission was granted directed to Arch-

bishop Cranmer, and nine other divines, to certify whether she continued his wife, notwithstanding a Divorce *à mensâ et thoro*, and whether, by the word of God, he might marry again. But before this matter was determined, he married again; at which the Privy Council were offended, because, according to the canon law, the first marriage continued good even after such a Divorce. The Marquis insisted, that, by the law of God, the very bond of marriage was dissolved for Adultery; and that marriage was never thought to be indissoluble till the Romish Church made it a sacrament. But yet, that Church, by the help of the canonists, invented such distinctions as made it easy to be avoided. He contended that it would be very inconvenient if a marriage were not dissolved on account of Adultery, because then the innocent person must live with the guilty, or be tempted to commit the like sin, if the bond of marriage still subsisted.

Soon afterwards the delegates gave sentence *in favour of the second marriage;* and, among other things, they founded it on Christ's definition of marriage, that two should be one flesh. So that where that was divided, as it must be by Adultery, the marriage itself was dissolved.

This sentence of the delegates was, by a private Act of Parliament, confirmed about four years afterwards, (to which only two Peers and two Bishops dissented,) and the second marriage was declared to be good by the law of God, any canon or ecclesiastical law to the contrary thereof, in any wise notwithstanding. And although, in the next year (1553) this Act was repealed, yet the reason mentioned in the preamble, (and a French writer has properly remarked, " C'est dans le préambule des loix qu'on puise leur esprit, et qu'on découvre les motifs de leurs decisions,") was because it was obtained upon private views, and was an encouragement for licentious persons to procure Divorces upon false allegations.

In 1554, we find a petition of the Clergy in Convocation, addressed to the Parliament, requesting that the innocent woman, when divorced, should enjoy the goods and lands that were her own before marriage. What became of this petition does not appear. But in the case of a separation obtained at the suit of the wife, for the crime of the husband, she is clearly entitled to her alimony. This is allotted her, even where she is the party complained of during the dependence of the suit, *(pendente lite,)* as, until the sentence is given,

the presumption is in favour of her innocence, and the marriage union is considered unbroken; but, after that period, it ceases, unless it be the crime of the husband, in which case, a permanent allotment is made to the injured wife;—if *she* is the offender she loses all: for, as Adultery amounts to a forfeiture of dower after his death, it is also a sufficient reason why she should not be partaker of his estate while living.

With regard to the power of re-marriage, in the 10th year of James I., an Act was passed to restrain it in the one party while the other was alive; but one of the provisions of that Act specially excepted from its operation the cases in which sentences of the ecclesiastical courts had pronounced Divorce. Coke explains this to mean both sentences *à vinculo* and *à mensâ;* as it was adjudged in the cases of Porter, 3 Coke, 461; and, afterwards, in that of Middleton, 14 Car. II. in the first of which, a Divorce *causâ sævitiæ*, in the second, *Adulterii*, were allowed to be good discharge from the felony.

But there is a further case noticed by Coke, that of Webster and Bury, (Instit. part 5. 98,) in which he states it to have been adjudged, that, in a Divorce, a marriage being dissolved *à vinculo*, even on the admission that a

second marriage was voidable, yet "that the same doth remain in force until it be dissolved; and that issue born during such second coverture, is lawful issue to inherit land."

The current of decisions is admitted to flow the other way; and the reason of this has been found in the reluctance felt by the law to disturb an engagement to which religion has lent so solemn a sanction.* In the reports of Noy, a second marriage was declared void; and it is further stated, that a plea of Divorce, *causâ Adulterii*, is no bar of dower, showing that the marriage was considered undissolved.†

In the year 1694, in the reign of William and Mary, the subject of Adultery and Divorce was discussed at considerable length by Parliament.‡ It was on the occasion of the Duke of Norfolk, who had proved his wife guilty of Adultery, moving for an Act of Parliament,

* "Vinculum matrimoniale semel perfectum non potest ab homine dissolvi nisi morte naturali. Separantur sed remanent conjuges." Oughton. Tit. 215.

† Noy, pp. 100, 108.

‡ Burnet's History of his Own Times, vol. iv. p. 184.

dissolving his marriage, and allowing him to marry again.

Bishop Burnet, in relating this case, notices the state of the law, and the customary practice on the subject. He traces the opinions of the later ages of popery in regard to the indissolubility of marriage, to the placing of marriage among the number of the sacraments. He then refers to the case of the Marquis of Northampton, which has been already considered. The reformation of the ecclesiastical laws as prepared by Cranmer, in King Edward's time, has also been noticed, wherein this second marriage was allowed to follow a Divorce for Adultery. Thus, Burnet remarks, the matter had rested for near a century, till Lord Roos, afterwards Duke of Rutland, moved for this liberty. This was in the time of King Charles, when, in addition to the loose and libertine sentiments which prevailed in relation to the marriage contract and all such obligations, there was a wish on the part of the King to extend an indulgence of this nature as a remedy for the unpleasant differences that existed between himself and his Queen. It was from an apprehension of the consequences to which such a step might, at that time, have led, that the Bishops strenuously opposed every part of

Lord Roos's Divorce, though many of them were persuaded, that Adultery, when fully proved, would admit of a second marriage.

In the case of the Duke of Norfolk, the Duchess was a Papist, and a strong party was made for her; but the proofs were too full to admit of a question respecting her guilt. But the main question was on the subject of the Duke's second marriage, and the Bishops were desired to deliver their opinions with their reasons. And here a division of sentiment appeared on the episcopal bench. The Prelates of William's reign considered a second marriage after Adultery to be lawful and scriptural, conformable both to the words of the gospel, and the doctrine of the primitive Church, and that the contrary opinion was started in the dark ages; but the Bishops of the two former reigns were of another opinion, though they hardly could tell why.

The Bill was let fall, and the dispute also; and it does not appear that any books were written on the subject.

But it is time to quit the consideration of England: too much space has perhaps been allotted to it; but it was deemed advisable to bring the course of remarks to the late

period just noticed, in order to introduce the important case of the Duke of Norfolk.

A few observations on Scotland and Ireland shall close the fourth section of this Essay.

By the laws of Scotland a similar distinction to that noticed in an earlier part of the Essay, appears to prevail on the subject of Adultery. One is called *simple*, the other *notour* Adultery. The punishment of the former is left to the discretion of the judge, and fine is the usual mode of visitation. That of the latter, or *notour* Adultery, by which is meant the conduct of open and incorrigible adulterers, unreformed by the censures of the church, where they keep company publicly together, and procreate issue; is a *capital* punishment.

This severity appears to have had an early origin. In the ecclesiastical laws of Keneth, King of Scots, anno 840, (Can. 14, 15.) the deflowering of a virgin is punishable with death, " unless she desires him for a husband;" and " he who adulterates another man's wife, she not dissenting, shall, together with the adulteress, suffer the severest punishment; if she were under force, she shall be acquitted."

In relation to Divorce, the writers on the Scotch law reason with great acuteness on the caution which should be employed in the permission of it, the just cause for it which Adultery furnishes, and the necessary consequences of re-marriage which flow from it. Those, say they, who would prohibit the guilty parties from marrying, ground their reasoning on incorrect legal principles: whatever moral aspect the case wears, both parties must be placed on the same ground. Either they are married, or they are not; if married, they cannot enter into a second engagement, for this would be bigamy; if not married, they are both at liberty to marry whom and when they please.* This liberty with them has indeed been abridged by special statute, for, though the law of Scotland, after the Divorce for *other grounds*, allows the guilty as well as the innocent person to contract a second marriage, yet, in the case of Divorce upon Adultery, such marriage is specially prohibited between the two adulterers; but the force of the general reasoning remains the same.

With the other Divorces by the Scotch law, on the ground of wilful desertion, (or non

* Erskine's Institutes. pp. 118 and 835.

adherence as it is termed,) founded on the passage, 1 Corinthians vii. 15; we have now no concern.

These Divorces compel the restoration of the Tocher, the *donationes propter nuptias*, as a just attendant on the punishment of that crime, by which the *nuptiæ* are destroyed.

We have now only to mention Ireland. By the 19th Canon of the Synod, held in Ireland by St. Patrick, and other Bishops, in 456, adulterers were to be excommunicated; and by the 26th Canon of the second Synod, a man that hath put away his wife on account of Adultery, is permitted to marry another, as if the first were dead.*

The great liberty which the ancient Irish indulged in these matters is evident, from the Letters of Pope Gregory VII. to Lanfranc, Archbishop of Canterbury, and from him to Gotric and Terdevralt, Kings of Ireland, and Anselm, another Archbishop of Canterbury, to Muriardac, another Irish King. They upbraid them with their frequent Divorces, and tell them it is as easy a matter with them to dissolve a marriage, as to contract it.

* Spelm. de Synod. Sancti Patricii. Sect. 19.

From the observations of Camden, it appears, that the laws and customs of the Irish remained the same in his time.*

This brings us to the limits of the fourth division of the Essay.

We have now passed over the first four heads of this Essay. It has been endeavoured to trace the principles, severally maintained, by the Jewish, Egyptian, Greek, and Roman laws, in relation to the crime of Adultery, and the liberty of Divorce; and the influence which the customs of those several nations appear to have had, in reference to those laws; at times demanding their enactment, at others, modifying their effects, and then occasioning their repeal.

We have examined, also, the simple principle which the Divine Founder of the *Christian* Religion has established, as the guiding and governing principle by which we should estimate the nature of the matrimonial union and the matrimonial crime, and form our judgment of the liberty admitted in the dissolution of the one, by the commission of the other. And we have fol-

* Camden. Brit. p. 1420.

lowed out the observance of this principle, or the departure from it manifested by the *teachers of the church*, and the *legislators of the world* in various nations, from that period, to the bounds which appear prescribed to the inquiry, by the terms of the Thesis.

Perhaps those bounds have, in the fourth head of the Essay, been somewhat overstepped; but it has been with a view to render the investigation more connected and complete.

SECTION V.

We enter now on the concluding head of the Essay; viz. Our remarks on the results to which all that has preceded naturally conducts. The reflections suggested by the previous facts and observations, must necessarily be brief, by reason, that most of the inferences which arise out of the laws and customs before noticed, have been stated in the progress of the Essay. A few additional remarks are however necessary, as a compendium of the whole.

The first impression that must arise from all that has been stated, is surely so obvious, that it need only be alluded to; viz. the hateful nature of the crime, and the painful nature of the remedy. It has been made sufficiently to appear, that Adultery is a crime as extensively

injurious to man, as it is peculiarly offensive to God. So offensive to God, that it is not only made the subject of an express prohibition, but it is employed by him, throughout the sacred writings, as a figure to describe that sin against himself, which has excited more indignation and jealousy than any other,—that of *idolatry*. "I was *married* to you, saith the Lord, yet *ye have committed Adultery against me*." That it is injurious to men is equally clear; it interferes with the great end of marriage, the production of genuine offspring, that *decus gentium*, which is alike the advantage of private families and the public state; and gives birth to deadly animosities, which find their only rest in the grave.

The injuries it inflicts on the husband and the children, are beautifully but painfully stated by an excellent American writer, to be "such as numbers cannot calculate, and tongue cannot describe. The husband is forced to behold his wife, once beloved beyond expression, not less affectionate than beloved, and hitherto untarnished even with suspicion, now corrupted by fraud, circumvention, and villany; seduced from truth, virtue, and hope, and voluntarily consigned to irretrievable ruin. His prospects of enjoyment, and even of com-

fort in the present world, are overcast with the blackness of darkness. Life, to him, is changed into a lingering death, his house is turned into an empty dreary cavern. Himself is widowed, his children are orphans, robbed of all their peculiar blessings, the blessings of maternal care and tenderness, the rich blessings of maternal instruction and government, the delightful and persuasive blessings of maternal example; and, this not by the righteous providence of God, but by the murderous villany of man. Clouded with woe, and hung round with despair, his soul becomes a charnel house, where life, and peace, and comfort, have expired; a tomb, dark and hollow, covering the remains of departed enjoyment, and opening no more to the entrance to the living."

With respect to *Divorce*, it is clear, that it is not a remedy to be *hastily resorted to*, and indeed its exclusive parent ought to be the commission of this crime, or some other equally destructive of the purposes of marriage.

Man's judgment may be seen peculiarly in the Jewish and Roman States; the latter of whom, when in the possession of their most uncontrolled liberty, were most the

prey of civil feuds. The judgment of *God* is to be found in that sentence of the Prophet's, "He *hateth* putting away."*

There has indeed been a gradation in the penal visitation of the crime under consideration, some nations requiring its expiation (in the human sense of that term) by death, others deeming whipping a sufficient punishment, others regarding fine an adequate compensation, while only in savage countries, and those not universally, it is regarded otherwise than in the light of a crime. It may, in general, be remarked, however, that where the punishment has been vested in the laws of the country, it is usually characterized by less severity, than when lodged in the hands of the party offended; and in the latter case, its severity varied according to the ideas entertained of women, and to the power assumed over the female sex.

By the Jewish law, it is clear, that Adultery was followed by *capital* punishment. That Divorce was *permitted* to the men, but *limited to causes which defeated the end of marriage.* That the increasing corruption of men extended this afterwards to signify slighter

* Mal. ii. 16.

causes of dislike, and that it was afterwards grasped by the women; that the other nations of the world, not possessing the same restraints which curbed originally the Jewish nation, surrendered themselves up to a greater liberty of Divorce; but that *all* regarded Adultery as a frightful offence against the peace of society and the happiness of men; "*Turpis Adultera*"* being the voice of all their sentiments.

That, amidst the confusion of opinions and

* That is a fine passage in Cicero, wherein he says, "Maximè admonendus, quantus sit furor amoris. Omnibus enim ex animi perturbationibus est profectò nulla vehementior; ut si jam ipsa illa accusare nolis, stupra dico, et corruptelas et *Adulteria, quorum accusabilis est turpitudo.*" &c. Tusc. Quæst. lib. 4. 35.

Lessius cites a supposition of some ingenious author, that the very animal creation have indicated an abhorrence of this crime; and relates an instance of a stork convicted of Adultery, "per olfactum masculi sui," having convened a flock of other storks, who first deplumed, and then destroyed the adulterous female. We may smile at the fable, but we must concur in the sentiment of the relater, that, "if the report seems improbable, yet the moral is very applicable."

Pliny, however, states, that the elephant knows no such thing as copulation with any but his own proper mate; that the dove does not, as he expresses it, ever violate the faith of wedlock; and that lions do, in a very severe manner, punish the adulteries of the lioness.

"Elephantis mirus pudor est. Nunque nisi habito coeunt. Nec Adulteria novere." Nat. Hist. lib. viii. cap. 5. "Colum-

irregularity of licentious freedom prevailing among the nations of the world, the Saviour of mankind appeared. That the publication of his new law from heaven was the period when the restoration of the former divinely dictated regulations to their original purity and strictness took place, and additional restraints, equally necessary, but not before practicable, were superinduced. Divorce was restricted to *one cause*, the single crime of *Adultery;* or, if the wider interpretation of the Saviour's words be received, to causes equivalent in their effects to Adultery, equally subversive of the marriage bond.

This last interpretation, however, demands the most scrupulous examination before it be allowed as just; and it has been inquired, with much earnest and forcible reasoning, whether there *can be* any equivalent to such a crime as this. Both the nature of things, and

barum mores simili ratione spectantur, pudicitia illis prima, et neutri nota Adulteria. Conjugii fidem non violant."

Lib. x. cap. 34.

Le Clerc, in his notes on Grotius, remarks this conjugal fidelity of the ringdove. Evid. Sect. xiii. vide Porph. iii. lib. de vesc. carn.

" Odore pardi coitum sentit in Adulterâ Leo: totâque vi consurgit in pœnam. Idcirco aut culpa flumine abluitur, aut longius comitatur." Plin. Lib. viii. cap. 16.

the doctrine of Scripture, point against it. The nature of things, for no crime nor injury is equally destructive of the bond and intent of matrimony, nor so pernicious in its result to domestic peace: and the doctrine of Scripture, for, as the Divine Legislator has in no place mentioned, or even intimated such an equivalent, it cannot be assumed by us. We cannot suppose, that, had he intended it, he would have maintained so unbroken a silence when he restricted the permission to *one* cause, particularly as the question of the Pharisees was directly inclusive of the causes to which we now advert.

It has further appeared, that, by Christ, both sexes were alike laid under the obligations of his laws: that, in every nation, where the doctrines of Christianity have been received, there also this equitable parallelism has prevailed; but that, in others, we have often had to notice an unjust, invidious, tyrannical, and oppressive distinction, in favour of the stronger sex. That, in *our own* country, the laws and practices of the people have undergone several changes; but that the rule of the Saviour now obtains, though certain forms must be observed in the attainment of the full remedy which, it is argued, that he intended for the injured party, and from which

the guilty cannot, by the nature of the case, but may, by special enactment, be separated; which forms, however, shackling the liberty of Divorce and re-marriage, leave the state of our law open to the possibility of a nearer approach and conformity to the Saviour's rule.

This is a summary of the historical view of the subject. Some miscellaneous remarks shall close the whole.

Many have contended against the indissolubility of the marriage contract with too great earnestness, and urged the propriety of tolerating Divorces on slighter grounds than those of Adultery. The case of the celebrated Milton* immediately occurs to the mind, and allusion to him could not properly be omitted in an Essay on this subject. In his elaborate Treatise on the Subject of Adultery and the Law of Divorce, he strongly argues in support of this view of the case; and his own treatment of his wife, who left him either from dislike of his philosophical mode of living, or his republican principles, at first, indeed, corresponded with his reasonings, but he after-

* Milton Tetrachordon.

wards relented. Milton's was the case of a man of strong judgment perverted by stronger passions. It is impossible to avoid smiling at the specious subtleties of some of his arguments, in order to repel the force of the terms in which the restricting clause of the Saviour's law is couched; he is obliged to reason thus: "The law of Moses is, 'Thou shalt do no manner of work on the sabbath-day;' but Jesus Christ says, 'Yes, works of charity.' And shall we be more severe in paraphrasing the considerate and tender gospel, than he was in expounding the rigid and peremptory law? He saith, 'The sabbath was made for man;' and I ask, What was more made for man than marriage?—and, as He dispensed with the law of the one, so would I with the law of the other. I want not pall or mitre, yet, in the firm faith of a knowing christian, which is the best and truest endowment of the keys, I pronounce, that man, who so binds the ordinance of marriage, not to have the spirit of Christ."

At another time, he argues, "The Saviour said, 'My yoke is easy, and my burden light;' whereas, if the knot of marriage may, in no case, be dissolved, save for Adultery, all the burdens and services of the law were not so intolerable."

These passages have been quoted, as serving rather to strengthen our own view of the case, than as likely to impair it; for they show Milton's mind to have been enough opposed to the views of the Romanists; while his other arguments for an increased laxity are sufficiently pregnant with mischief and inconsistency, to furnish their own confutation. The master sophistry that pervades his whole Tetrachordon, is the transfer of those causes of Divorce that interfere with the great end of marriage, that of offspring, to causes purely of mind, temper, and inward habit; and these he contends furnish greater inaptitudes for marriage, and more defeat the design of it than any that can exist in reference to the body. Milton must have suffered sorely in his matrimonial connexions when he is reduced to support his position by such an idea as that of one of the old Fathers: "All wedlock is not God's joining. Where harmony is, there God joins; where it is not, dissension reigns, which is not from God; for God is love."

It has been justly remarked that Milton was too fond of Hillel. Perversions, like these, might be made of every duty in the Bible. "Scripture might be employed in self-annihilation; and the awfulness and sanctity of its commands explained away by its own libe-

rality of spirit, and its merciful condescension to human weakness."

It is astonishing that men who admit the authority of the Saviour on such a point as this, should attempt to evade prohibitions so explicit, by any ingenuities of argument, which are dictated rather by the feelings of prejudice than the cool reflections of enlightened reason.

To all the subtle sophistries of these writers, it will be sufficient to oppose the forcible and elegant language of the learned Judge of one of the Ecclesiastical Courts, in a memorable sentence delivered by him, in a matrimonial suit, many years ago.* In the arguments which had been adduced in that case, in support of the separation, much stress had been laid on the wretched state of disaffection in which the parties were living, and in which they were to continue to live, unless relieved by a sentence of Divorce. To this the learned Judge replied; "The *humanity* of the court has been loudly and repeatedly invoked. Humanity is the *second virtue of courts;* but, undoubtedly, the first is *justice.* If the present were a question of humanity simply, and confined its

* The Right Hon. Sir William Scott, since created Lord Stowell.

views to the present parties, it would be easily decided on first impressions. Every body must feel a wish to sever those who wish to live separate from each other, and who cannot live together with any harmony; but the *law* has said, that married persons shall not be separated upon the mere disinclination of one *or both* to cohabit together. The disinclination must be founded upon reasons which the law approves. To vindicate the policy of the law is no necessary part of the duty of a judge; but it would not be difficult to show that the law, in this respect, has acted with its usual wisdom and humanity; with that true wisdom and real humanity which regard the general interests of mankind. For though, in particular cases, the repugnance of the law to dissolve the obligations of matrimonial cohabitation, may operate with great severity upon individuals, yet it must be remembered, that the general happiness of the married life is secured by its indissolubility. When people understand that they *must* live together, except for a very few reasons, known to the law; they learn to soften, by mutual accommodation, that yoke which they know they cannot shake off; they become good husbands and good wives, from the necessity of remaining husbands and wives, for necessity

is a powerful master in teaching the duties it imposes. If it were once understood, that, upon mutual disgust, persons might be legally separated, many couples, who now pass through the world with mutual comfort, with attention to their common offspring, and to the moral order of civil society, might have been at this moment living in a state of mutual unkindness, of estrangement from their children, and of unrestrained and licentious immorality. The happiness of some must then be sacrificed to the general good."

This reasoning is fully confirmed by the Roman historians, to whom we cannot help once more adverting. They describe, in strong terms, the reluctance felt by that people, when they were pressed to marriage by Augustus; a circumstance, which sufficiently indicates, that the prevailing institutions were not favourable to the men, and also refutes the specious theory, (as Gibbon properly observes,) that the liberty of Divorce contributes to the *happiness* and *virtue* of a people. Of the readiness with which this facility of separation hastened the disorderly effects of the corrupt passions of human nature, and destroyed the peace and simplicity of those habits which had before characterized their

domestic polity, we have abundant proof in the Roman writers. Juvenal's "octo mariti quinque per autumnos;" Seneca's "numero maritorum annos computere;" and Martial's "jam decimo nubit Thelesina viro," though not a little hyperbolical, when completed "in tricesimâ luce," yet serve to satirize the evils of the time, and prove the monstrous products of those laws, which, for causes the most trivial, permitted, and consequently gave occasion to, multiplied Divorces.

Circumstances have of course arisen in reference to this, as well as all other crimes, which, partaking of lighter or deeper shades of moral turpitude, have furnished materials of the nicest casuistry. The writers on natural law have supposed cases in which this crime might present a very different aspect from that which it wears in the calm scenes of domestic quietude and civil peace. War sometimes introduces in the train of its numerous evils the commission of crimes which no foresight could control. On such a principle as this, it must be, that some have contended it to be one of the rights of war, that the wives of the enemy, taken as prisoners, may be considered part of the lawful spoil of the conqueror, and be tributary to his embrace. But this right has been too

long and too universally questioned by the practice of civilized nations, to require any lengthened refutation.

It has also been a question, whether the power of the husband over the person of his wife was not such as to enable him to *consent* to her committing Adultery, without contracting guilt, in a case of life and death, or extreme peril. It is surprising to find so devout a man as St. Augustine, admitting the force of the reasoning urged in favour of this supposition, and not at once rejecting the impure proposal with the disgust and indignation it merited.

Another doubt respecting the power with which marriage was considered to invest the parties, was very specious, because it apparently approached nearer to the true end of marriage. It was asked, whether Adultery might not be committed without a crime, if both parties *consented to it with a view to the procreation of children*, and it was contended that the records of the patriarchal ages furnished instances of the alienation of the person of the husband, even at the suggestion of his wife. But these were cases in which the peculiar state of the world's population has found no parallel, and to which, therefore, is appropriated its exclusive justi-

fication; "Donec mundus repleretur," is the ground on which the patriarchal practice of polygamy rested: although, even in the instances of Abraham with Hagar, and Jacob with the handmaid of Leah, to which the reference is made, it cannot be thought that there was a total absence of any intermixture of evil; and when the reasons which justified these customs had ceased to operate, marriage was restored to its original rights, and those deviations from the correct course of nature became criminal. Still the circumstance of consent remained: and agreement being considered the essence of a contract, and marriage being regarded apart from its religious character merely as a contract of a civil nature, it was thought to be dissoluble by the consent and at the mutual pleasure of both parties. "In Papiani responsis hæc lex: consensu utriusque repudium dari, et matrimonium posse dissolvi."

But this is opposed to the view which results from the Saviour's law of Divorce and marriage, is equally contrary to the dictates of natural law, and adverse to the maxims of the law of England. By this last, as we have already noticed, in any proceedings to obtain a sentence of Divorce, the least appearance of collusion or

consent between the parties would be sufficient to vitiate the attempt; and suits of separation are often *defended*, without the least hopeful ground for defence, in order to remove any imputation of this kind.

We must return to add a few remarks on the more immediate subject of the Essay.

In the primitive church, as we have seen, Adultery was thought to dissolve the marriage contract, so that the parties might marry again. In the Greek, Lutheran, and Calvinist Churches, this opinion still continues. It is thought by them to be more agreeable to the divine law, as well as to the principles of all civil contracts, which it certainly is; for the contrary opinion would write the marriage law in characters more indelible and perpetual, than the Saviour himself has done. Others contend, that such a construction would operate unfavourably to the moral interests of society. The Romanists, we have shown, totally disallow of it, because they number marriage among the sacraments, and account it a bond so sacred, that no crime committed, or provocation given by either party can dissolve it; and we have referred fully to the Council of

Trent, and the Papal anathemas against all who thought otherwise, with the exception, however, made in favour of the Venetian Republic and her dependencies.

The law of Scotland, however, seems to have viewed the whole of this important subject in that light which best harmonizes with the doctrines of the Scriptures. The chief argument against the liberty of re-marriage is that which, on the supposition that a dissolution of the marriage bond is effected by the act of Adultery, would make a return to cohabitation between the parties an adulterous intercourse, if it took place without the intervention of a second marriage. But this difficulty is overcome by the Scotch law, which views the dissolution of the first *vinculum* as effected, not by the adulterous act itself, unless, when the discovery is made of it, the injured party wishes to avail himself of it,* (thus viewing it in the same manner as all other contracts are regarded,) but by the sentence of Divorce, the judicial declaration founded upon satisfactory proof of the crime.

* The innocent person may *recede* from his right, and renounce a favour introduced on his own behalf.

Ayliffe's Parergon, p. 40.

We have, in the Third Section of the Essay, remarked on the reasonings of those who would deny to the guilty party the liberty of re-marriage, while they concede that liberty to the innocent and injured party; and, although such a measure is clogged by considerable difficulty, it is, nevertheless, one which appears to carry with it much that is plausible and specious; for there is reason to fear, that adulterous connexions are often formed with a view to the final union of the companions in crime; and certainly this would afford the seducer a tempting argument to overcome the yet remaining scruples of his victim, when he had once captivated her affections; and, by not prohibiting this, it is said the legislature would be conferring a privilege, where it ought to inflict a punishment. We find, that by the law of Scotland, there is a special statute on this subject, which *does* restrict the union of the adulterer and adulteress: and it has been proposed to annex a clause, similar to the provision of the Scotch law, to the penal acts of South Britain. Paley thought the proposal certainly deserved an experiment; but, in the mean time, we renew our remark, that this must be by a special legislative enactment: for, until this happens, the nature of things requires this liberty as

the unavoidable result of the dissolution of the contract, and the permission of the privilege to one of the contracting parties. That some alteration, however, in the state of the law on this part of the subject, namely, the punishment of the guilty party, might be advantageous, can hardly be doubted, and that it is called for is equally clear. The history of the matter has been traced, and it cannot be concluded from that review, that because Adultery is now regarded only as a civil injury and a private offence, that therefore the law has always considered it such; and that the infliction of a penalty would be an innovation on the ends of justice: we have seen the contrary. The punishment was not intended to be annihilated, when it was transferred from the secular to the spiritual tribunal. Ecclesiastical judgment did but take up what either the throne felt a disinclination to continue, or an inability to retain, and what had been dilapidated from the Imperial, went to the augmentation of the Canonical law. And what is the ecclesiastical censure? Can it be supposed of much effect with criminals like these? The exposure of the person, modern refinement has prevented, and the mutilation of the features, humanity forbids; neither the ancient "*demembratio*," nor the "*currere*

nudus," are to be wished for again; and then, as to the early penances, they likewise are obsolete. Excommunication is now no longer dreaded. The fellowship of the church is no object of envy with the licentious; and as to the denial of the holy communion till the adulterer should reform, can it be thought of much terror to those, whatever ancient effect it had, who never yet regarded that ordinance as a spiritual consolation, or any thing else than an unmeaning and superstitious rite? The punishment, then, which his demoralizing habits render nugatory, as respecting his *soul*, (*salutem animæ*,) the adulterer ought to suffer in his *person*, and some species of corporal suffering, imprisonment, the mildest, at least, ought to be put in force against him. In the case of the *abduction* of a man's wife, public fine, and imprisonment for two years, are added to the recovery of private damages; and both the King and the husband may maintain the action. Surely the *seduction* of the woman is not such an extenuation of the crime as to justify the loss of any remedy but that which is open to a sufferer for the most trivial loss.

As to the punishment of the adulteress, more difficulty may perhaps be felt; but surely no affected amiable sympathy towards her

sex should screen one who has, by an act like this, torn from herself that quality, without which that sex would merit, and would receive no sympathy. The necessity for some legislative provision is strongly felt here. The denial of the liberty of re-marriage would do something, but a more severe measure is wanted. In the Catholic countries, convents hide the adulteress from the reproaches of the world. But we have none. By the old law of France, she was shorn, and took the veil for life; but, as an elegant writer observes, our only convent is our country, and the culprit is at large in it.

There was, however, another provision of the old ordinances of France, and which was common to the early laws of our own country, as noticed in the fourth section of the Essay, which may furnish a useful suggestion on this matter. The crime of the woman occasioned the forfeiture of her fortune to her husband.* And not only did our earlier English laws inflict the loss of the wife's dower and paraphernalia; but cases have occurred where the Adultery of the wife has been adjudged a sufficient cause of enmity for a donor or testator to have been considered to have

* Dict. de Droit. Civil.

revoked a legacy, or gift *mortis causâ*, in her favour.

This suggestion has been noticed by Paley in his "Moral Philosophy," with great acuteness. He thinks such a law might be framed, directing the fortune of the offender to descend, *as in the case of her natural death*, reserving a certain *limited* portion of the produce as an annuity for her life, and suspending the reversion in the hands of the heir. Others think the husband, in all cases, should have the whole usufruct of the property to maintain his motherless children; but, if the necessity for such a provision could once be recognized, the minutiæ of its adjustment would soon be settled; and, as a taste for expensive, as well as vicious pleasures, and a fondness for extravagance, are the customary accompaniments of the disposition to commit this crime, it appears that the tendency of such a law would be very beneficial in checking the urgency of the criminal suitor, as also the disposition of the heedless wife to listen to his arts. The crime is hateful enough. We have remarked already how it is viewed by God, and contended that it should be regarded in the same light by man. The observation is repeated in order to rebut the slanderous and gross misinterpretation of

the words of Jesus Christ towards one poor offender of this kind, which should not be unnoticed in an Essay on this subject. The incident of the Woman taken in Adultery is recorded in the eighth chapter of St. John's Gospel. As Christ told the woman, say they, "Neither do I condemn thee;" it must be considered that he either regarded her conduct as not criminal, or as considerably less so than we would characterize such conduct to be.

But whoever will carefully examine the narrative of the Evangelist, and notice the cold and stern reception which the Saviour gave to these accusers, who came *tempting him*, as usual hoping to lead him to commit himself to the Roman authority; the keen and pointed rebuke with which he dismissed them all, and then, adverting to the absence of all witnesses necessary to *a legal and judicial conviction*, asked, "Hath no *man condemned* thee?" will not be at a loss to understand the sense in which the term condemnation is here employed, nor confound his compassion for the offender with complacency at the crime. Condemnation of blame, reproof, censure, many had given her: yet she says, "No man, Lord:" and the Saviour replied, "Neither do *I*," *judicially*. 'Thou *hast* sinned in

this matter: in this I agree with thine accusers; but,' "*Go; and sin no more.*"*

* This view of the subject may find ample and interesting corroboration in the Horæ Judaicæ of Lightfoot, who has gleaned more plentifully, perhaps, than any other writer, from the Rabbies and Masters of traditions.

In one part of his elaborate folio he remarks on the words, "'Moses commanded, that such should be stoned, but what sayest thou?' as if to inquire of Christ whether the offender might not have the benefit of *Divorce*, and escape the penalty of *death*." In another part he remarks the mode of reply adopted by Christ, which he contends was strictly formed upon the favourite notions adhered to by them of the trial by bitter waters. "In that manner will be brought to trial the accusers first. 'Ye have brought this woman to me. I will govern myself according to the rule of trying by the waters of jealousy. You say, if the husband be guilty of the same crime, that trial loses all its effect, and the accused cannot be hurt. If the divine judgment proceeded in this manner, so will I. Are you, that accuse this woman, wholly guiltless in the like kind of sin? Whosoever is, let him cast the first stone; but if you, yourselves, stand chargeable with the same crime, then your applauded tradition, the opinion of your nation, may determine this case, and acquit me from all blame, if I condemn not this woman when her accusers themselves are to be condemned.'"

The idea of *judicial* condemnation is supported by the supposition that these scribes and pharisees were some of the members of the Sanhedrim, the Jewish bench of judicature, who thus themselves convicted, could not judicially convict the woman.

"The office of the priest, when trying the suspected wife,

Another observation respects the reciprocity of crime, to which the case of accuser and accused, in the last passage, being in the same predicament, naturally leads us.

Lenocinium, it is said, is a good defence for the wife against the husband; and a plea of recrimination *(reciprocatio criminis)* is an available bar against a claim to separation. But this is a strange maxim: the prior transgression of the one party is no apology for the Adultery of the other. It may extenuate, but it can never justify, unless it can be shewn that the obligation of the marriage vow depends upon the construction of *reciprocal fidelity*. Besides, the legal soundness of this opinion is open to doubt; for, while the infidelity of the *one* party is ground for Divorce,

was to stoop down and gather the dust off the floor of the sanctuary, which, when he had infused into the water, he was to give her to drink. He was to write also in a book the curses or abjurations that were to be proved upon her. (Numbers v. 17, 23.) In like manner, the Saviour stoops down, and making the floor itself his book, he writes something in the dust, doubtless against these accusers, which he was resolved to try in analogy to those curses and abjurations written in a book by the priest against the woman that was to be tried. The latter, intimating it was a doubtful case, blotted the curse; but Christ, to intimate that he had no doubt of the accusers' guilt, writes again a second time."

this construction makes the infidelity of *both* to secure the continuance of the contract; and has a manifest tendency to multiply the offence, but none to reclaim the offender. But this remark has been, in part, anticipated in considering the state of the Scotch law.

With regard to *sentences* of Divorce, it may be observed, that they are highly necessary, as judicial declarations of the true *status* of the parties.

All dissolutions of the marriage contract should be formal and notorious. The mere entering into a new league with Titia is no sufficient dissolution of the previous one with Sempronia. These solemn proceedings are therefore highly useful, and the wisdom of our laws has certainly provided for as complete an investigation of the case as circumstances admit. There must be the verdict against the adulterer at the common law, next the sentence in the spiritual court, and then the operation of an Act of Parliament is required before a Divorce, with liberty of re-marriage, can be enjoyed. The complaint could not receive a more full investigation. Far be the time when such remedies as Divorces shall be considered slight, and made

easy of attainment! We have, we trust, made it sufficiently apparent, that they are not to be hastily pronounced or sought for. If any further evidence were necessary, it might be found in a Report issued by the Abbé Gregoire, Chairman of a Committee appointed by the National Assembly of France on this subject. In that country, he states, that within three months after their celebrated law permitting Divorces had passed from the National Assembly, there were, in the city of Paris, almost as many Divorces registered as marriages; and in the whole kingdom, upwards of *twenty thousand*, in the short space of about a year and a half. The Abbé, not without reason, remarks, " Vraiment cette loi-ci veut bientôt desoler toute la nation." In the town of Newhaven, in the United States of America, more than fifty Divorces had happened within five years after the extension of the Divorce laws; and in the State of Connecticut, more than four hundred, in the same period, averaging one in every hundred married couple, according to the state of population. There is also an instance recorded of a declaration made by a French soldier before a judicial tribunal in Paris, that he had married eleven wives in eleven years.

There can be no doubt of the disorders which a facility of Divorce would necessarily occasion.

If a period in the history of England should ever arrive in which a latitude should be indulged in matters of this kind, evils would be introduced more pregnant with mischief to social intercourse, and destructive of civil comfort, than are those, great indeed as they are, which the more unrestrained indulgence of the crime itself could entail; and it would be a period in which the sentiment of the poet would be wrung from the hearts of the people, weeping over the waste which the abundant use of this remedy had introduced:

——————— "Væ nobis!
Ut olim malis, sic remediis, fessa
Terra laboratur."

We now draw this Essay to a close. One inference will appear prominent in the reflections that have preceded. A wish to revive the ancient spirit of penal visitation against the seducer; a dread of limiting that penalty to the prohibition of his intermarriage with the adulteress, as a measure altogether inadequate to the prevention of the crime, but a recommendation of such a punishment of her,

as, while it may keep at a distance the enemies of her virtue, may also impress a salutary caution on her own mind, and a continual apprehension of the loss of her fortune, and the inspection of her moral conduct.

These things might tend to repress that lightness of speech, if not that depravity of heart, which can smile at offences so grave in their criminal complexion, and so deplorable in their results, as if they were of the most trivial and transitory nature, and which, by a perversion of language, can appropriate the most soft and gentle epithets to the arts of seduction, for which the harshest terms are far too mild. To this may be traced, perhaps, much of the disregard of the social obligations, and the violations of the conjugal tie, that prevail in what is called civilized life. Alas! what are our advantages of improvement in science, literature, and art, if they preserve us no better from excesses like these; when nations, destitute of such aids, have yet displayed a circumspection and fidelity well worthy of the study of modern times? There is not a more beautiful delineation of the simplicity of a people, in reference to these matters, than Tacitus gives of his ancient Germans, when he describes them, though destitute of learning and knowledge, yet as cha-

racterized by a remarkable freedom from these licentious practices, and these inroads on domestic peace, and possessing a discrimination far better than the attainments of the most refined of modern libertines: "Nobody among them," he says, "calls vice mirth, or the venial custom of the age." "Litterarum secreta viri pariter ac feminæ ignorant. Paucissima tamen in tam numerosâ gente Adulteria. *Nemo enim illic vitia ridet, nec corrumpere et corrumpi, sæculum vocatur.*" It seems as if the historian had brought these sentiments into contact to furnish a sarcasm on those, who, possessing advantages so far superior to their's, are yet distinguished by any thing but their purity, their self-government, and respect for the marriage bond.

One word, in allusion to the motto selected for the Essay, shall bring all to a conclusion. It was intended to convey, as a kind of summary of the treatise, these two particulars; an intimation of the deficiency of the laws of England, as they now stand, with respect to the visitation of this crime, and an observation of the peculiar power of the gospel, which effects that, in attempting which all other legislation fails. *They* strive against a current of corruption, which they may divert,

but cannot dry up: but the gospel, in enacting laws, supplies motives and strength equal to their observance.

The ode of the satirist, indeed, could only apply generally to the defectiveness of laws which left unvisited, or which visited only with partial rigour, obliquities such as these: but it describes with inimitable beauty the simplicity and happiness of a people to whom these crimes are strangers.

> " Illîc matre carentibus
> Privignis mulier temperat innocens:
> Nec dotata regit virum
> Conjux, *nec nitido fidit adultero.*"

This, it declares, is the best safeguard of family peace, the true domestic wealth.

> " Dos est magna parentium
> Virtus, et *metuens alterius viri*
> *Certo fœdere castitas:*"

And then, the line which leads to the motto, points his strong invective against that lax legislation which treats with mildness so pestilent a crime:

> " Et peccare nefas, *aut pretium est mori.*"

This is our remonstrance, then, against the

mitigated penalties of English law; and this our tribute to that better code, which gives the *moral* while it enjoins the obligation.

> " Quid tristes querimoniæ,
> Si non supplicio culpa reciditur?
> Quid *leges* sine *moribus*
> Vanæ proficiunt?"

The ancients had a fabulous account of a youth, who, having detected his mother in the act of Adultery, with his own hand slew her on the spot. This youth's name (Phasis) was afterwards transferred to the river of Colchis, on whose banks grew the plant λευκοφυλλος, stated to have been a remedy for adulterous propensities. But these were " old wives' fables." The real antidote to all crime, and all inclination for sinful pleasure, is only to be found in the word of God;—*that* is the true Phasis. The river of Jordan and the brook Cedron are better than all the waters of Colchis: there, only, the leprous may wash and be clean;* there alone is nourished the tree of life,† whose leaves can heal the nations from the painful diseases and

* 2 Kings, v. 12. † Rev. xxii. 2.

wounds of sin; and among whatever people the influence of its motives is really felt, it may be said, in the language of the Roman historian; "Plusque ibi boni *mores* valent, quam alibi bonæ *leges*."

FINIS.

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